Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERT S. GORDON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Ninth Circuit's decision that the Mandatory Victims Restitution Act (MVRA) entitles corporations to prejudgment interest on criminal restitution orders must be reversed because the MVRA does not include interest as a loss subject to restitution, and the Ninth Circuit's interpretation of the statute to include it conflicts with decisions of the Courts of Appeals for the Third, Fourth, Fifth, Seventh and Tenth Circuits?

Whether the Ninth Circuit's decision that the MVRA permits a "lost opportunity" measure of restitution for offenses involving property must be reversed because it conflicts with the plain meaning of the words of the statute and with decisions of the Courts of Appeals for the Third, Fourth, Fifth and Eleventh Circuits?

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit (Pet. App. 1-34) is reported at 393 F.3d 1044. The memorandum disposition of the U.S. District Court for the Northern District of California is unpublished and is reproduced at Pet. App. 35-39. The district court's final order of restitution is unpublished and is reproduced at Pet. App. 40-43.

JURISDICTION

The Ninth Circuit filed its opinion December 30, 2004 and denied a petition for rehearing and petition for rehearing en banc in an order filed March 2, 2005. Pet. App. 44.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix (Pet. App. 45-48) reproduces the text of 18 U.S.C. § 3663A.

STATEMENT OF THE CASE

Introductory Summary

This case arises out of an order directing defendant Robert Gordon, a Stanford Law School graduate and former federal circuit law clerk and investment banker at First Boston and Goldman Sachs, to pay criminal restitution to

Cisco Systems, Inc., his former employer, in the amount of $27,397,206.84. Pet. App. 3, 40-43.

Gordon was prosecuted for and plead guilty to embezzling stock certificates of four different companies that he should have deposited in Cisco's Treasury Department, and misappropriating four cash distributions intended for Cisco. Gordon agreed to pay restitution to Cisco for the stock and cash in the full amount specified by 18 U.S.C. § 3663A(b)(1), *i.e.*, an amount equal to "the value of the property" on the date of its loss or the date of sentencing, whichever was higher. The government, on behalf of Cisco, sought (and received) additional restitution, based on theories of damages advanced by Cisco in the federal civil action it had filed against Gordon and which was pending before the same district judge.

In particular, the district court ordered Gordon pay Cisco "prejudgement interest" of $2,424,913.33 on top of the restitution amount for each of the assets. Further, as to one of the assets, the shares of an internet start-up company called Terayon, the court ordered Gordon to pay restitution in an amount equal to Cisco's lost opportunity to sell the shares during the stock market bubble of 2000-2001. Based on evidence presented at a restitution hearing that lasted one afternoon, the court determined the "lost opportunity" amount to be $12,593,902.23.

In a split decision, a Ninth Circuit panel majority upheld the order for lost opportunity restitution for the Terayon shares, and for prejudgment interest restitution as applied to cash and other liquid assets on the ground that it made Cisco "whole," and thus fulfilled the underlying purpose of the restitution statute. The panel majority reversed the order for prejudgment interest as to the

shares of companies Cisco had not liquidated, on the ground that awarding interest as those shares went "beyond making Cisco whole and is therefore unauthorized under the MVRA."[1] Pet. App. 26.

Judge Fernandez dissented from the majority's decision affirming the order for prejudgment interest restitution and for lost opportunity restitution. Judge Fernandez said he could "see no basis [in the statute] for considering prejudgment interest to be part of criminal restitution," and that the majority's construction of the statute to allow "lost opportunity" restitution "does not take account of the normal use of language." Pet. App. 30, 31.

The Ninth Circuit's decision that the MVRA entitles corporations to prejudgment interest on criminal restitution orders conflicts with decisions of the Third, Fourth, Fifth, Seventh and Tenth Circuits, and its decision allowing "lost opportunity" restitution for offenses involving the loss of property conflicts with decisions of the Third, Fourth, Fifth and Eleventh Circuits.

More broadly, as to both prejudgment interest and lost opportunity restitution, the Ninth Circuit's explicit reliance on the MVRA's underlying purpose of making victims "whole" as the basis for determining whether a restitution order is authorized under 18 U.S.C. § 3663A conflicts with decisions of the Third, Fourth and Fifth Circuits.

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[1] Referring to the Mandatory Victims Restitution Act of 1996 ("MVRA"), Title II of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

Proceedings In the District Court

1. Robert S. Gordon voluntarily appeared on April 23, 2001, in the San Jose Division of the Northern District of California on a complaint charging him with wire fraud. CR 2.[2] He was indicted May 9, 2001. CR 8. Gordon immediately began transferring funds to the government to be available for restitution; by August 7, 2001, he had transferred more than $18 million, which exceeded the value of the assets as of the date they were embezzled. ER 11, 32, 34.[3]

The following spring, while still on pretrial release, Gordon attempted suicide and came perilously close to succeeding. He was unconscious for several days and in a coma when hospitalized. He suffered permanent nerve damage to his leg and remained hospitalized for physical and mental health reasons for a number of months. CR 97 (pp. 10-11)

Cicso served Gordon with a civil lawsuit after his failed suicide attempt. It was based on the same conduct as the criminal prosecution, and included a RICO cause of action and a multitude of other civil wrongs and sought millions of dollars in damages. Cisco's civil case was assigned to the district judge presiding over the criminal case.

2. On July 30, 2002, Gordon entered a guilty plea to a four count superseding information filed that same date charging two counts of wire fraud (18 U.S.C. § 1343), one

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[2] "CR [#]" refers to the clerk's record.

[3] "ER" refers to the excerpts of record Gordon filed with the Ninth Circuit and is followed by the page number.

count of insider trading (15 U.S.C. §§ 78j(b), 78ff(a), 17 C.F.R. § 240.10b-5) and a criminal forfeiture count. Pet. App. 1.

The facts established by Gordon's admissions as part of his plea included the following. Beginning in late 1997, and continuing through early 2000, Gordon retained possession of certificates of stock of four companies, Cabletron, Microsoft, ISSX and Terayon, that he should have deposited with Cisco's treasury department. At various times during that period, Gordon deposited the shares into two accounts he had opened (one in Los Angeles in the name of Cisco Systems, Inc., Bahamas and the other in Canada in the name of a Cisco affiliated company, Skystone Systems, Ltd.), and liquidated the shares. Pet. App. 4; ER 17. Gordon also diverted four separate cash distributions intended for Cisco to the two accounts. ER 39-41.

Gordon agreed as part of his plea that he was required to pay restitution for the property he had embezzled. He specifically agreed he was required to pay restitution for the four equities and four cash distributions in an amount equal to the value of each of the assets on the date of the loss of the property (which totaled to $17,863,106.2) or on the date of sentencing, if it were higher. ER 2-3; 53-54.

The government reserved the right to seek restitution for one of the equities, Terayon, based on a lost opportunity measure of restitution, and to seek additional restitution for prejudgment interest and Cisco's investigative costs. Pet. App. 5.

3. Gordon was sentenced on December 20, 2002, to a term of 66 months imprisonment and three years supervised release. ER 203, CR 99, 173. The court departed one

level based on Gordon's extraordinary acceptance of responsibility based on his efforts at making restitution. RT 12/20/02 p. 88.[4] The district court granted the government's request that it be allowed to seek restitution for the embezzled Terayon shares based on a lost opportunity measure of damages and scheduled a restitution hearing for that purpose. The district court also granted the government's request that Gordon be ordered to pay prejudgment interest on whatever turned out to be the final amount of restitution. Pet. App. 5-6.

4. After a number of continuances, extensive briefing, and several settlement conferences, the court set the restitution hearing for the afternoon of May 19, 2003. CR 160. Gordon did not learn how Cisco intended to prove its lost opportunity theory of damages until days before the hearing when Cisco produced declarations of two employee witnesses. ER 331.

Gordon issued witness and document subpoenas to obtain information to challenge Cisco's factual theory and to present affirmative defenses. CR 114-116. The district judge granted Cisco's motion to quash the subpoenas. In quashing the subpoenas, the court said the issue to be addressed at the hearing was a narrow one – the value of the Terayon shares on the date they were embezzled, and whether Cisco could prove the shares had an "inchoate" value on that date which was greater than the market price, and consequently Gordon had no need for the witnesses and records he had subpoenaed. ER 315, 319-20, 322-23, 331. When the parties appeared for the hearing,

[4] RT refers to the reporter's transcript of proceedings.

however, the court said its earlier comments "were unduly restrictive in terms of what could be considered." Upon reflection, the court had decided to allow Cisco to offer proof that it would have sold the shares at a higher price and to seek restitution based on the inability to do so. ER 337. Gordon's request that the court reconsider its ruling granting of the motion to quash the subpoenas in light of the expanded scope of the hearing was denied. ER 384.

The evidence at the restitution hearing showed that Cisco acquired 896,834 shares of Terayon in December, 1995. Pet. App. 9. On December 14, 1998, Gordon liquidated a certificate of 54,525 shares. The value of the shares on that date was $1,635,692. Pet. App. 9.

On June 24, 1999, Gordon embezzled additional Terayon certificates totaling 100,000 shares. The value of the 100,000 shares at the time they were embezzled was $4,887,500. Pet. App. 9. Gordon deposited the certificates in one of the accounts in September, 1999, and sold the shares between September and November, 1999. Pet. App. 9.

Cisco liquidated the remaining 742,309 shares of Terayon from July 21, 1999 to March 6, 2001. Pet. App. 9. Based on the testimony of Cisco employees David Holland and Roger Biscay, Cisco contended it would have sold the 154,525 embezzled shares between July, 1999 and July 12, 2000. Pet. App. 10. The court found "there is no way to determine when or to what extent the actual shares embezzled by Defendant would have been liquidated within that time frame." Pet. App. 36. What the court did find was that "all of the shares embezzled by Defendant . . . would have been sold by" March 6, 2001, a finding which it "necessarily" inferred from the fact that "Cisco

liquidated the last of its Terayon holdings on March 6, 2001." Pet. App. 36.

The district judge issued a written memorandum following the hearing stating he was "satisfied that it is reasonable, equitable and consistent with the purposes of the restitution statute to consider Cisco's lost opportunity to sell the Terayon shares at a higher price in determining the amount of the loss caused by Defendant's embezzlement of the shares." Pet. App. 35-36. Having acknowledged that there was "no way to determine when or to what extent the actual shares embezzled by Defendant would have been liquidated within" the period it had concluded the shares would have been sold, the court ruled that "the most reasonable method for determining the value of the embezzled shares," was to take "the average closing price of Terayon stock between July 21, 1999 and March 6, 2001," and multiply it by the number of embezzled shares. Pet. App. 36. The average share price was calculated to be $81.50 for each of the 154,525 shares, which totaled to $12,593,902.23. Pet. App. 10, 37, 40.

The Court rejected Gordon's position that the median rather than mean share price should have been used, and denied Gordon's argument that the amount should be reduced to reflect the fraudulent inflation of Terayon alleged by shareholders, and to reflect the sales costs and commissions. Pet. App. 16-19, 36-37.

The court also adopted the government's position that the amount of prejudgment interest should be calculated separately for each embezzled asset, starting with the date it was embezzled and continuing until Gordon's guilty plea on July 30, 2002, using the government interest rate in effect at the date of taking for each asset. Pet. App. 22,

38-39, 42. In calculating interest for the Terayon lost opportunity, the court set the accrual date as March 6, 2001. Pet. App. 22. Based on that method and rate of calculation, the court ordered Gordon to pay prejudgment interest in the amount of $2,424,913.32. Pet. App. 38-39, 42.

The court's final order of restitution was filed June 6, 2003, and ordered Gordon to pay a total restitution amount of $27,397,206.84. Pet. App. 40-43. Gordon appealed to the Ninth Circuit, invoking the Court's jurisdiction under 28 U.S.C. § 1291. *See* 18 U.S.C. § 3664(o) (order of restitution is a "final judgment").

Proceedings On Appeal

In a split decision, a panel of the Ninth Circuit affirmed in part, reversed in part and remanded for entry of a new restitution order. Pet. App. 2, 37.

1. The panel majority (Clifton, C.J. and Paez, C.J.) affirmed the order for prejudgment interest restitution as applied to the cash distributions, and the shares of Terayon and Cabletron. The panel majority upheld the prejudgment interest as to the Terayon and Cabletron shares because Cisco had liquidated its remaining shares of both companies as of April, 2001, when Cisco learned of Gordon's embezzlement of shares, and the court assumed Cisco would have also liquidated the embezzled shares as well. Pet. App. 25-26.

The majority conceded the "MVRA is silent on the issue of prejudgment interest," but relied on the "primary and overarching goal" of the MVRA of "making the victim whole" to approve prejudgment interest restitution

concluding that "Congress' aim 'to fully compensate . . . victims for their losses" . . . is best served by awarding prejudgment interest where the victim's actual losses include lost opportunities to use property for productive purposes." Pet. App. 23. "As a corporation," Cisco was "eligible for prejudgment interest restitution," and did not have to demonstrate it would "have placed its stock proceeds in an interest bearing account had Gordon not embezzled them" or otherwise would have invested them successfully because "'interest' is simply a proxy for a 'lost opportunity.'" Pet. App. 25, *quoting, Govt. Of Virgin Islands v. Davis*, 43 F.3d 41, 47 (3d Cir. 1994). For a "a profit maximizing entity like Cisco" prejudgment interest was authorized because it "reflects the 'productive purposes' for which [it] uses its cash reserves." Pet. App. 25. (footnote omitted).

The majority reversed the order for prejudgment interest as to the shares of the companies that Cisco continued to hold (ISSX and Microsoft). The majority reasoned that as applied to these assets, prejudgment interest could not be considered to be an "actual loss" because it was "too speculative to assume Cisco would have liquidated" the shares "and placed the cash proceeds in an interest bearing account or used them for some other productive purpose . . . " The award of prejudgment interest as these assets was "unauthorized under the MVRA" the majority ruled, because it "goes beyond making Cisco whole . . . " Pet. App. 26, *citing*, *United States v. Smith*, 944 F.2d 618, 626 (9th Cir. 1991).

The majority ordered the case remanded for entry of a new restitution order that would recalculate the amount of prejudgment interest consistent with its opinion. Pet. App. 25, n. 15, 27, n. 17.

Judge Fernandez dissented, stating simply that he could "see no basis for considering prejudgment interest to be part of criminal restitution where an item of property was taken . . . " Pet. App. 31. Judge Fernandez explained that in "a true money-at-interest case, the interest can be said to be part of the value of the property taken on the date of the loss itself," and would be included in the amount of restitution as the MVRA directs that for offenses involving the loss of property, restitution is to be ordered in an amount equal to the "value of the property" on the date of the loss. Pet. App. 33; 18 U.S.C. § 3663A(b)(1)(B)(i)(I).

2. The panel majority upheld the district court's order directing Gordon to pay restitution for the Terayon shares based on Cisco's lost opportunity to sell them at a higher price. The majority ruled the statute's command that restitution be ordered in an amount equal to the "value of the property" on the "date of . . . loss" or the date of sentencing, whichever was higher, did not limit the court to one of two discrete dates. Instead, the majority approved the district court's analysis, explaining the "district court had reasonably construed the loss to Cisco concerning the Terayon stock to be its inability to liquidate the stock between July 21, 1999 and March 6, 2001," and accordingly determined "the 'date of the loss' to be each possible date within that particular period." Pet. App. 14. The majority upheld the district court's interpretation of the "date of the loss" provision of the statute (in which the nature of the victim's loss is used to determine the date of loss), as "not an abuse of discretion" because it "is consistent with the remedial purposes underlying the MVRA

and restitution generally."[5] Pet. App. 14, 16 ("[W]e hold only that the district court did not abuse its discretion in" in interpreting "the date of the . . . loss" to mean the date Cisco lost the opportunity to sell the shares).

Judge Fernandez dissented, relying on the plain meaning of the words of the statute to conclude that the "date of . . . loss" provision of § 3663A(b)(1)(B) referred to the date of the loss of the property, and was one of "two easily determined discrete dates" that Congress had selected for purposes of determining restitution in property cases (the other being the date of sentencing). Pet. App. 28, 31. Judge Fernandez pointed out that while "courts can massage and explicate the 'date of loss' concept," the majority's interpretation of the statute's date of loss provision "does not take account of the normal use of language." Pet. App. 30.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's Decision That the MVRA Entitles Corporations to Prejudgment Interest on Criminal Restitution Orders Conflicts With the Decisions of the Third, Fourth, Fifth, Seventh and Tenth Circuits

A. The MVRA Does Not Authorize Restitution For Prejudgment Interest

1. The scope and amount of restitution that may be ordered in any particular case is limited by the statute

[5] The majority further ruled the district court was required to use this same "lost opportunity" measure of restitution for the shares of Cabletron because Cisco had also liquidated all of its Cabletron shares before learning of the embezzlement. Pet. App. 10, n. 5, 27, n. 16.

authorizing the restitution order. *Hughey v. United States*, 495 U.S. 411, 415-18, 110 S. Ct. 1979, 1982-83, 109 L. Ed. 2d 408; *United States v. Randle*, 324 F.3d 550 (7th Cir. 2003) ("'[F]ederal courts possess no inherent authority to order restitution, and may do so only as explicitly empowered by statute.'"), *quoting*, *United States v. Hensley*, 91 F.3d 274, 276 (1st Cir. 1996).

The statutory source of authority for the restitution order in this case is 18 U.S.C. § 3663A.[6] Pet. App. 45. The offenses to which the MVRA "shall apply," are set forth in subparagraph (c), and include the offense in this case, "an offense against property . . . " Sec. 3663A(c)(1)(A)(ii).

The MVRA requires a court to order a defendant to make restitution to a "victim" of an offense to which it applies; a "victim" is "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered."[7] Section 3663(a)(1)&(2).

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[6] Section 3663A was first enacted in 1996 as part of the Mandatory Victims Restitution Act of 1996. Title II of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996)

[7] The MVRA co-exists with 18 U.S.C. Section 3663, which was originally enacted as the Victim Witness Protection Act of 1982 ("VWPA"), Pub. L. No. 97-291, 96 Stat. 1248 (1982) (originally codified as §§ 3579, 3580).

The VWPA authorizes (but does not require) a court to order a defendant to make restitution for the offenses to which it applies, and identifies factors the court "shall consider" in deciding whether to order a defendant to make restitution. Section 3663(a)(1)(B)(I). The VWPA specifies that it is not applicable to offenses to which MVRA (Section 3663A) applies. 18 U.S.C. § 3663(a)(1)(A)

With the exception of the mandatory/discretionary difference between the two statutes, they are identical in all important respects and the courts interpreting MVRA look to and rely on cases interpreting

(Continued on following page)

The restitution a court is required to order depends on the type of harm the offense resulted in. *See,* Subparagraphs (b)(1)-(3).[8] In addition, subparagraph (b)(4) provides that in "any case" to which the MVRA applies, the restitution order shall require the defendant to "reimburse the victim" for certain expenses.[9]

The restitution required in this case is determined by subparagraph (b)(1), which governs restitution required for an offense resulting "in . . . loss . . . of property of a victim of the offense . . . " Section 3663A(b)(1). Subparagraph (b)(1) requires the court to order the defendant to return the property; and if return of the property is not possible or would be inadequate, the court is required to order the defendant to pay an amount equal to "the value of the property on the date of the . . . loss . . . ," or the value on the date of sentencing, whichever is greater.[10] 18 U.S.C. § 3663A(b)(1).

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the VWPA as precedent. *See United States v. Randle*, 324 F.3d 550, 555, n. 2 & 555-556 (7th Cir. 2003) ("The provisions of the VWPA and the MVRA are nearly identical in authorizing an award of restitution."); *United States v. Akande*, 200 F.3d 136, 140 (3rd Cir. 1999).

[8] Listing different types of restitution to be ordered depending on whether the offense is one resulting in: (b)(1) damage to or loss or destruction of property of a victim; (b)(2) "bodily injury to a victim;"), or (b)(3) "bodily injury that results in death of a victim . . . "

[9] Specifically, the order of restitution shall require defendant "reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." Section 3663A(b)(4).

This same provision was added to the VWPA in 1994, as Section 3663(b)(4).

[10] The MVRA (like the VWPA), further limits restitution to those losses that "directly" "result" from and are "proximately" caused by the

(Continued on following page)

2. Section 3663A contains no explicit authority for ordering interest or prejudgment interest as an item of restitution, nor is there any reference to interest in the text of the statute. Nor does any other statute authorize prejudgment interest to be included in a criminal restitution order. *Cf.* 28 U.S.C. § 1961 (interest in civil cases). Post-judgment interest on criminal restitution orders of more than $2,500 is authorized and required by 18 U.S.C. § 3612(f)(1).

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defendant's offense. *See* Section 3663A(a)(2) & Section 3663(a)(2) (both defining a "victim" as a "person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered . . . "); *United States v. Stoddard*, 150 F.3d 1140 (9th Cir. 1998) (Restitution "'can only include losses directly resulting from a defendant's offense.'"), *quoting, United States v. Sablan*, 92 F.3d 865, 870 (9th Cir. 1996) ("[A] restitution order must be based on losses directly resulting from the defendant's criminal conduct.").

The government has the burden of proving this causal connection between the victim's loss and the defendant's offense by a preponderance of the evidence. *United States v. Rice*, 38 F.3d 1536, 1540 (9th Cir. 1994) ("[T]he government has the burden of establishing by a preponderance of the evidence that the victim's damages were caused by the conduct of which the defendant was convicted."), *quoting, Hughey v. United States*, 495 U.S. 411, 413, 110 S. Ct. 1979, 1981 (1990) (citations omitted).

The government has the same burden with respect to the amount of loss for which restitution is sought, and the defendant's offense. Sec. 3664(e) ("Any dispute as to the proper amount or type of restitution shall be resolved by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by the victim as a result of the offense shall be on the attorney for the Government."). Section 3664 governs the issuance and enforcement a restitution order, whether made pursuant to Section 3663A or Section 3663. *See* Section 3663A(d); Section 3663(d).

B. The Ninth Circuit's Decision Broadens An Existing Circuit Conflict As to Whether Interest Is Subject to Criminal Restitution

1. The reported cases in which circuit courts have addressed the question of whether interest may be included in a criminal restitution order were cited by the panel majority and the dissent. Pet. App. 23, 32. Judge Fernandez concisely summarized the decisions in which interest was allowed in writing that "every similar case that I have discovered deals with a situation where the property taken was 'money,' and that money was being loaned at a given interest rate or was contained in an interest bearing account or instrument." Pet. App. 32.

Courts have reversed restitution orders that include interest where the asset was not earning interest, even though it was cash or the equivalent. *United States v. Rico Indus., Inc.*, 854 F.2d 710, 711-12, 714 (5th Cir. 1988) *and United States v. Sleight*, 808 F.2d 1012, 1014-15, 1020 (3d Cir. 1987).

Other circuits, including the Fourth, Seventh and Tenth have allowed interest to be included where the property taken was an interest bearing asset. *See* Pet. App. 32 (Fernandez, J., dissenting), *citing, inter alia, United States v. Morgan*, 376 F.3d 1002, 1014 (9th Cir. 2004); *United States v. Shepard*, 269 F.3d 884, 886 (7th Cir. 2001); *Virgin Islands v. Davis*, 43 F.3d 41, 46-47 (3d Cir. 1994); *United States v. Hoyle*, 33 F.3d 415, 416-18, 420 (4th Cir. 1994); *United States v. Rochester*, 898 F.2d 971, 982-83 (5th Cir. 1990).

Courts have upheld including interest in the restitution amount in those circumstances not as "prejudgment interest," however, but because "the interest can be said to be part of the property taken on the date of the loss itself, or, at worst, on the date of sentencing." Pet. App. 33 (Fernandez, J., dissenting). In those circumstances, interest is properly included in the restitution amount as part of the statutory measure of restitution required in property cases – the "value of the property" on the date of its loss or the date of sentencing, whichever is higher. 18 U.S.C. § 3663A(b)(1).

Other decisions approve including interest as part of the restitution amount where the property taken was an interest earning asset not under the authority of § 3663A(b)(1), but on the ground that it is part of the victim's "actual loss." *See, e.g.*, *United States v. Smith*, 944 F.2d 618, 626 (9th Cir. 1991) (upholding a restitution order that included payment of interest to a financial institution on the amount of a fraudulently obtained loan because in that circumstance, "[f]oregone interest [due on a loan] is one aspect of the victim's actual loss . . . ") (citation omitted).

2. The Ninth Circuit panel majority decision conflicts with all of these decisions – it holds that prejudgment interest is authorized by the MVRA regardless of whether the asset was earning interest; and regardless of whether the victim demonstrates that interest would have been earned on the asset; and it determines whether an award of prejudgment interest is authorized according to whether it makes a victim "whole." Pet. App. 26.

The majority conceded the "MVRA is silent on the issue of prejudgment interest." Pet. App. 23. The fact that the statute makes no mention of interest was given no

significance by the majority. Instead, the majority turned to the "primary and overarching goal" of the MVRA of "making the victim whole" to determine whether prejudgment interest was authorized by the statute. The majority concluded it was authorized on the ground that "Congress' aim 'to fully compensate . . . victims for their losses' . . . is best served by awarding prejudgment interest where the victim's actual losses include lost opportunities to use property for productive purposes." Pet. App. 23, n. 13.

The panel majority exempted Cisco from having to show it would "have placed its stock proceeds in an interest bearing account had Gordon not embezzled them" or otherwise would have invested them successfully because "'interest' is simply a proxy for a 'lost opportunity.'" Pet. App. 25, *quoting, Govt. Of Virgin Islands v. Davis*, 43 F.3d 41, 47 (3d Cir. 1994). For "a profit maximizing entity like Cisco" prejudgment interest was authorized because it "reflects the 'productive purposes' for which [it] uses its cash reserves." Pet. App. 25 (footnote omitted).

The majority also relied on the purpose of the statute making the victim whole in reversing the order for interest as to the shares of the companies that Cisco continued to hold however (ISSX and Microsoft). The majority reasoned that as applied to these assets, prejudgment interest could not be considered to be an "actual loss" because it was "too speculative to assume Cisco would have liquidated" the shares "and placed the cash proceeds in an interest bearing account or used them for some other productive purpose . . . " The award of prejudgment interest as to these assets was "unauthorized under the MVRA" the majority ruled, because it "goes beyond making Cisco whole . . . " Pet. App. 26, *citing*, *United States v. Smith*, 944 F.2d 618, 626 (9th Cir. 1991).

C. The Ninth Circuit's Reliance On Legislative Purpose For Its Expansive Reading of § 3663A Conflicts With the Decisions of the Third, Fourth, and Fifth Circuits

A restitution order "must conform to the specific type and amount of award that is authorized by the plain language of the statute." *United States v. Mullins*, 971 F.2d 1138, 1146-47 (4th Cir. 1992). Section 3663A provides no authority for ordering "prejudgment interest" in this or any other case subject to the MVRA. Judge Fernandez made this point in dissent, stating simply that he could "see no basis for considering prejudgment interest to be part of criminal restitution where an item of property was taken . . . " Pet. App. 31. Thus, interest may be included as an item of criminal restitution only where it constitutes an actual loss for which the statute otherwise authorizes ordering restitution. *DeSalvo*, 41 F.3d at 511 ("Federal courts do not have the inherent power to order restitution. The power to order restitution must therefore stem from some statutory source . . . ")

The only restitution the MVRA authorizes for offenses involving property is return of the property and, if that is not possible, payment of an amount equal to its value on the date of its loss or the date of sentencing, whichever is higher. 18 U.S.C. § 3663A(b)(1). Interest is only authorized, and may only be ordered, where it is part of the "value of the property."

The legislative purpose of the MVRA of making victims whole is not a source of authority for ordering prejudgment interest restitution. The panel majority's reliance on the statutory purpose to broaden the statute beyond its text conflicts with decisions of the Third, Fourth and Fifth Circuits. *United States v. Simmonds*, 235 F.3d at 831 ("[T]here is no doubt that the VWPA does not

necessarily authorize a sentencing court to order restitution in an amount that represents a victim's entire loss. *See Hughey v. United States*, 495 U.S. 411, 413, 110 S. Ct. 1979, 109 L. Ed. 2d 408 (1990). Congress simply did not write the VWPA to fully satisfy the more ambitious purpose expressed in the legislative reports upon which [the government] relies."), *quoting, Government of the Virgin Islands v. Davis*, 43 F.3d 41, 46 (3d Cir. 1994); *United States v. Mullins*, 971 F.2d at 1146-47 ("An order of restitution under the VWPA must conform to the specific type and amount of award that is authorized by the plain language of the statute. . . . The plain language of the statute is to be given effect, even if costs that are not included would appear to be justified as a way of making the victim whole." (citations omitted)); *United States v. Mitchell,* 876 F.2d at 1184 ("[T]he fact that the goals of the [VWPA] may be thwarted by denying lost income restitution does not authorize us to ignore the plain language of the statute").

The panel majority's decision upholding the order for prejudgment interest restitution should be reversed and its decision reversing prejudgment interest restitution for the ISSX and Microsoft shares should be sustained, but on the ground that prejudgment interest is not authorized by 18 U.S.C. § 3663A.

II.

The Ninth Circuit's Interpretation of § 3663A to Permit a "Lost Opportunity" Measure of Restitution Conflicts with Decisions of the Third, Fourth, Fifth, and Eleventh Circuits

A. The Ninth Circuit's Decision Approving a "Lost Opportunity" Measure of Restitution Contravenes the MVRA Which Limits Restitution to the Value of the Property on the Date of its Loss or the Date of Sentencing

1. As noted above, the restitution that is required to be ordered for the embezzled Terayon certificates is determined by subparagraph (b)(1) of section 3663A. Specifically, it requires the court to order the defendant to return the property; and if return of the property is not possible or would be inadequate, the court is required to order the defendant to pay an amount equal to "*the value of the property on the date of the . . . loss . . .*," or the value on the date of sentencing, whichever is greater.

Because Gordon redeemed the stock certificates, and thereafter liquidated the redeemed shares, "return of the property under subparagraph (A) is impossible . . . " Section 3663A(b)(1)(B). As a consequence, in accordance with subparagraph (B), "[t]he order of restitution shall require" that Gordon "pay an amount equal (i) to the greater of –

> (I) the *value of the property on the date of the* damage, *loss*, or destruction; or the *value of the property on the date of sentencing . . .* "

18 U.S.C. § 3663A(b)(1)(B)(i)(I)&(II) (emphasis added).

The fixed measure of restitution is "the value of the property," and the two alternative valuation dates are "the

date of the damage, loss, or destruction" of the property, or "the date of sentencing . . . " Section 3663A(b)(1)(B)(I). As the dissent correctly pointed out, the statute identifies two discreet dates – the date of the loss of the property and the date of sentencing – and directs restitution be ordered in an amount equal to the value of the property on one of those dates, whichever is higher. Pet. App. 31.

In this case, the value of the property was higher on the date of its loss. The loss of the certificate of 54,525 shares occurred on December 14, 1998, and its market value on that date was $1,635,750. ER 2. The loss of the certificates of 100,000 shares occurred June 24, 1999, and their market value on that date was $4,887,500. ER 2. Using the statutory measure of restitution and the statutory valuation date, the restitution amount for the Terayon certificates is $6,523,250. That is the amount of restitution Gordon agreed he was required to pay for Terayon in his plea agreement. ER 53.

2. The district court recognized the statute requires the "value of the property" be determined on one of two discreet dates, the date of the loss of the property or sentencing. ER 319 (The Court: " . . . I think you start out with the statute and the statute and the cases interpreting the statute seems [*sic*] to be pretty narrow in terms of valuation dates.") The court did not want to use that the date of the loss of the property, however, because it would not "account for the lost opportunity or the value that Cisco would have realized but for the taking." ER 337. The court realized that if it used the loss opportunity to sell the shares to determine restitution, rather than the value of the property, it would not be restricted to the date of the loss of the property, because the date of the loss would then be the date when Cisco was unable to sell the shares.

The court thus concluded that using a lost opportunity measure of restitution was consistent with the "date of . . . loss" provision of § 3663A(b)(1) because "[b]y this [lost opportunity] measure, the loss is deemed to have occurred on the date the shares would have been sold had they not been embezzled . . . " Pet. App. 36.

3. The panel majority said that because "[t]he MVRA offers no further elaboration on 'the date of the loss' provision," it was "unclear whether the district court's average stock price valuation method is consistent with the text of the statute . . . " Pet. App. 11. On that basis, the majority said it was necessary to turn to "[t]he purpose, the subject matter, the context [and] the legislative history of th[e] statute" to determine if the district court's "valuation method is consistent with the text of the statute . . . " Pet. App. 11. Finding "no discussion within the MVRA's legislative history regarding the 'date of loss' provision," the majority "turn[ed] to the remedial principles underlying the MVRA and restitution generally . . . " for guidance. Pet. App. 11.

The panel majority quoted a statement from a Third Circuit decision in which the court had identified the underlying purpose of the statute: "'[W]e are presented with a statute[,] the primary and overarching goal of which is to make victims of crime *whole*, to *fully* compensate these victims for their losses and to restore these victims to their original state of well-being[,] that expressly directs the judge to award restitution in an amount equal to the value of the property on the date of the damage, loss, or destruction.'" Pet. App. 12, *quoting, United States v. Simmonds*, 235 F.3d 826, 831 (3d Cir. 2000) (emphasis supplied by panel majority). The panel majority also cited the proposition applicable to the

"general restitution context" that the "'purpose of restitution is . . . to restore the defrauded party to the position he would have had *absent* the fraud." *Nelson v. Serwold*, 687 F.2d 278, 281 (9th Cir. 1982).

The majority then reviewed the date of loss the district court had adopted and the date of the loss of property to determine which better fulfilled the statute's underlying purpose. In the view of the majority, the "district court had reasonably construed the loss to Cisco concerning the Terayon stock to be its inability to liquidate the stock between July 21, 1999 and March 6, 2001," and on that basis had appropriately determined "the 'date of the loss' to be each possible date within that particular period." Pet. App. 14. The "district court's 'date of loss' determination," was thus "consistent with the remedial purposes underlying the MVRA and restitution generally," as it sought to make Cisco whole. Pet. App. 14.

In contrast, the majority said that if the court had used the date of the loss of the property, it "would have prevented the district court from accounting for Cisco's total losses." Pet. App. 15. Because using the date Cisco lost the opportunity to sell the shares as the date of the loss made Cisco whole, the majority ruled the district court approach was consistent with the statute and not an abuse of discretion. Pet. App. 14, 16. ("[W]e hold only that the district court did not abuse its discretion in" interpreting "the date of the . . . loss" to mean the date Cisco lost the opportunity to sell the shares).

As Judge Fernandez's dissent explains, the panel majority's excursion into the legislative purpose of the statute to ascertain how to interpret the "date of . . . loss" provision was not only unnecessary but unwarranted. The

plain meaning of the words of the statute make it evident that the "date of . . . loss" refers to "when the property was lost to the victim." Pet. App. 30 (Fernandez, J., dissenting). Moreover, the end result of the majority search resulted in an interpretation that "does not take account of the normal use of language." *Id.*

Moreover, the panel majority's decision is flawed fundamentally because it identifies no source of statutory authority for "lost opportunity" restitution, or authority for contravening the statutory command that restitution be ordered in an amount equal to the value of property. Instead, the panel majority accepts without question that "lost opportunity" restitution can be ordered if it makes the victim whole, and thus avoids the limitation imposed by § 3663A's "date of . . . loss" provision by using the nature of the loss to define the date it occurred. Under the majority's approach, a court would first determine the full amount of the victim's loss, and whenever that loss occurred would be deemed to be the "date of loss" for purposes of section 3663A(b)(1)(B)(i), making the words of no consequence.

B. The Ninth Circuit's Decision Conflicts With Decisions of the Third, Fourth, Fifth and Eleventh Circuits

1. The panel majority's adoption of the district court's "lost opportunity" measure of restitution as a means to conform the award to the statute conflicts with decisions of the Third, Fourth and Fifth Circuits. *United States v. Simmonds*, 235 F.3d at 834 (victim's lost insurance premium discounts are not within scope of statute because they "do not in any way constitute or represent "the value of the property" lost, damaged or destroyed as a result of Simmonds's crimes."); *United States v. Mullins*,

971 F.2d at 1146-47 (4th Cir. 1992) (victim sought restitution for losses suffered from not repossessing the stolen equipment when he had the opportunity to do so and court remands for determination of restitution based on value of the equipment on the date of the loss of the equipment or sentencing, less value of property returned); *United States v. Sharp,* 927 F.2d 170, 174 (4th Cir.), *cert. denied,* 502 U.S. 844, 112 S. Ct. 139, 116 L. Ed. 2d 106 (1991) (lost income not proper measure of restitution in case involving loss of property); *United States v. Mitchell,* 876 F.2d 1178, 1184 (5th Cir. 1989) (restitution for lost income not authorized for offenses resulting in damage to, loss of, or destruction of property).

Under the panel majority's decision, the restitution rejected in these cases would have been approved. The restitution would have been consistent with the purpose of making the victim whole, and the "date of . . . loss" would be the date the victim was unable to repossess the equipment, or lost income from being unable to work.

2. The panel majority's ruling that the statute does not fix the "date of . . . loss" as the date of the loss of the property conflicts with decisions of the Fourth and Eleventh Circuits which recognize, as did the dissent in this case, that the "date of loss" to which the statute refers is the date of the loss of the property. *United States v. Shugart,* 176 F.3d 1373, 1375 (11th Cir. 1999) (appropriate measure of value of property on date of loss for a church burned down by the two defendants "requires the defendants to pay restitution in an amount equal to the "value" of the Church on the day they burned it down."); *United States v. Mullins,* 971 F.2d 1138, 1147 (4th Cir. 1992) (vacating restitution order because "[n]o findings were

made as to the value of the equipment either on the date of loss or on the date of sentencing.").

C. The Ninth Circuit's Reliance On the Statute's Purpose For Its Decision Conflicts With Decisions of the Third, Fourth and Fifth Circuits

As with the panel majority's decision regarding prejudgment interest, its reliance on the purpose of the statute to determine whether the district court's order for lost opportunity restitution was authorized by the MVRA conflicts with decisions of the Third, Fourth and Fifth Circuits. *United States v. Simmonds*, 235 F.3d at 831; *Government of the Virgin Islands v. Davis*, 43 F.3d at 46; *United States v. Mullins*, 971 F.2d at 1146-47; *United States v. Mitchell*, 876 F.2d at 1184.

D. The Ninth Circuit's Expansive Reading Of the Statute Is At Odds With the Fair and Efficient Functioning of the Criminal Restitution Process

In enacting the MVRA and the VWPA Congress had dual objectives: it wanted to make restitution available in circumstances in which "entitlement to restitution could be readily determined by the sentencing judge based upon the evidence he had heard during the trial of the criminal case or learned in the course of determining whether to accept a plea and what an appropriate sentence would be," and, at the same time " . . . 'to prevent sentencing hearings from becoming prolonged and complicated trials on the question of damages owed the victim.'" *United States v. Kones*, 77 F.3d 66, 69 (3rd Cir. 1996), *citing and quoting*, S.Rep. No. 532, 97th Cong., 2d Sess. 31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2536-37; *see, United States v.*

Edwards, 162 F.3d 87, 91 (3rd Cir. 1998) *citing and quoting*, S.Rep. No. 104-179, 1996 U.S.C.C.A.N. 924, 925-26, 930-31 (additional citations omitted). ("The legislative history . . . [of the MVRA] evinces a Congressional intent to streamline the administration of restitution within the criminal justice system; to make mandatory criminal restitution under the MVRA a penalty separate from civil remedies available to the victims of crime; and to caution that the administration of mandatory restitution should not take on the procedural complications of civil proceedings – in other words, to ensure that restitution under the MVRA is a form of criminal penalty rather than civil redress.").

As the Court in *Kones*, 77 F.3d at 69, observed, "[t]his aspect of Congress' expectation is important because it counsels against construing the text of the statute in a way that would bring fault and causation issues before the sentencing court that cannot be resolved with the information otherwise generated in the course of the criminal proceedings on the indictment."

The wisdom of that observation is made manifest by this case. Gordon was made to defend against sophisticated theories of civil damages in a hearing that lasted one afternoon. Gordon was not even allowed to exercise subpoena power, much less pursue the discovery necessary to meet the combined force of the U.S. Attorney's Office and Cisco's team of civil lawyers, and yet Gordon was faulted on appeal for failing to provide evidentiary support for his unclean hands and intervening cause defenses. As Judge Fernandez explained in dissent,

> a typical civil case is designed to explore the many nuances involved in determining just how much damage was inflicted upon the victim by

> the wrongdoer. As we all know, that can involve months and years of litigation, expensive discovery proceedings, motions proceedings, and all of the other things that go into the mix of arriving at a just result in a civil case. That is not this case.

Pet. App. 33.

The outcome of this case was not just. The green-light that the Ninth Circuit panel majority's decision gives to the aggressive pursuit of sophisticated theories of damages in criminal restitution hearings will not only produce unjust results, but as Judge Fernandez further explained in his dissent, it will burden the district courts with complex issues that are more suitably, and more fairly, resolved in the civil arena.

CONCLUSION

The petition for certiorari should be granted, and the order for prejudgment interest restitution should be ordered vacated and the lost opportunity restitution for the Terayon shares should be ordered vacated and restitution ordered in an amount equal to the value of the property on the date of its loss.

Respectfully submitted,

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393 F.3d 1044

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Robert S. GORDON, Defendant-Appellant.
No. 03-10322.

Argued and Submitted July 15, 2004.
Filed Dec. 30, 2004.

William J. Genego, Santa Monica, CA, for the defendant-appellant.

Kevin V. Ryan, San Jose, CA; Hannah Horsley, San Jose, CA; and David R. Callaway, San Jose, CA, for the plaintiff-appellee.

Appeal from the United States District Court for the Northern District of California; Jeremy Fogel, District Judge, Presiding. D.C. No. CR-01-20077-JF.

Before: FERNANDEZ, PAEZ, and CLIFTON, Circuit Judges.

CLIFTON, Circuit Judge:

This case presents the disappointing story of a promising federal appellate law clerk gone bad. Robert Gordon, a graduate of Stanford Law School and a former law clerk for one of our colleagues, a judge on the U.S. Court of Appeals for the Seventh Circuit, embezzled millions of dollars in cash and stock from his employer, Cisco Systems. Following his guilty plea conviction for wire fraud, 18 U.S.C. § 1343, and insider trading, 15 U.S.C. § 78j(b), Gordon appeals the district court's final order of restitution. The district court imposed restitution in a total

amount of $27,397,206.84 under the Mandatory Victims Restitution Act of 1996 ("MVRA"), Title II, Subtitle A of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214, codified in relevant part at 18 U.S.C. §§ 3663A, 3664 (1996). Gordon does not dispute the entire amount of the restitution order but contends that certain portions should not be included. At issue on appeal are the restitution order's award of $12,593,902.23 for embezzled shares from one company; prejudgment interest of $2,424,913.32; and reimbursable investigation costs totaling $1,038,477.00.

The primary and overarching goal of the MVRA is to make victims of crime whole. In achieving this objective, Congress intended district courts to engage in an expedient and reasonable restitution process, with uncertainties resolved with a view toward achieving fairness to the victim. Guided by these principles, we hold that the district court's restitution analysis for the embezzled shares, including its fairly sophisticated "date of the loss" calculation, was not an abuse of discretion. Nor did the district court abuse its discretion in declining to account for brokerage house commissions or for awarding restitution for costs incurred by Cisco during its participation in the criminal investigation. Finally, we conclude that the district court did not abuse its discretion in awarding prejudgment interest in regards to the embezzled cash and shares of the companies Terayon and Cabletron. The district court did, however, abuse its discretion in awarding prejudgment interest for the other embezzled securities. We therefore affirm in part, reverse in part, and remand for entry of a new order of restitution.

I. BACKGROUND

A. Statutory Framework

The MVRA makes restitution mandatory for particular crimes, including those offenses which involve fraud or deceit. *See* 18 U.S.C. § 3663A(c)(1)(A)(ii). Under the MVRA, a court must order restitution to each victim of an offense, and the court cannot consider the defendant's economic circumstances. *See* 18 U.S.C. § 3664(f)(1)(A). The prior restitution statute, the Victim and Witness Protection Act ("VWPA"), required courts to consider the economic circumstances of the defendant prior to ordering restitution, and the granting of restitution was discretionary, not mandatory. *See* 18 U.S.C. § 3663. With these exceptions, the two statutes are identical in all important respects, and courts interpreting the MVRA may look to and rely on cases interpreting the VWPA as precedent. *See United States v. Randle*, 324 F.3d 550, 555-56 & nn. 2-3 (7th Cir.2003) ("The provisions of the VWPA and the MVRA are nearly identical in authorizing an award of restitution.").

B. Factual Background and Procedural History

Robert Gordon attended Stanford Law School, where he was an associate managing editor of the *Stanford Law Review.* Upon graduating from law school, Gordon served as a law clerk for a judge on the U.S. Court of Appeals for the Seventh Circuit. Prior to his employment at Cisco, Gordon was an investment banker at Goldman Sachs and First Boston.

Gordon was employed at Cisco from September 1995 to April 2001. He started at Cisco as a director in the Corporate Finance Department and, in 1999, transferred

to the Business Development Group. Through late 1997 until April 2001, Gordon obtained stock certificates from companies in which Cisco had acquired an interest and, instead of depositing those certificates with Cisco's treasury department, transferred them to two brokerage accounts he had established. He then sold the embezzled shares and used the proceeds to make stock trades using information gained from his insider position with Cisco.

In addition, under Gordon's guidance, Cisco loaned $15 million to Spanlink, a start-up company in which Cisco had previously invested. Cisco was not aware, however, that Gordon personally had previously lent Spanlink $5 million, posing as a venture capital investor and using funds previously embezzled by him from Cisco, and that Gordon had received 50,000 shares of Spanlink "Series B" Preferred Stock in return for arranging that loan. After Spanlink received the $15 million, Gordon redeemed the preferred shares for $10 million, turning a $5 million profit for himself.

In April 2001, Cisco discovered that shares were missing from one of the accounts from which Gordon had embezzled stock. Cisco's officers spoke to Gordon about the missing shares. They asked him for his laptop computer. Gordon said his laptop was at home, but he agreed to bring it to Cisco the following day. Gordon was told that he should not erase anything from the hard drive. Yet as confirmed by subsequent forensic analysis, Gordon went home that night and used an "evidence eliminator" software program to delete files from his computer. Further analysis established that Gordon had run that program at least five times to overwrite deleted files.

Discovering that Gordon had embezzled certain shares, Cisco launched an internal investigation to determine the extent of the embezzlement. This involved identifying all the transactions in which Gordon had been involved during his five years with the company. As a result of this investigation, Cisco identified five additional embezzlements totaling more than $13 million in losses to Cisco. Two of these embezzlements involved Cisco's investments in another technology company called Terayon.

In April 2001, the government charged Gordon with wire fraud, and in May 2001, an indictment alleging two counts of wire fraud was returned. Gordon pled guilty to a superseding information alleging two counts of wire fraud, one count of insider trading, and one forfeiture count. Under the plea agreement, Gordon agreed to pay restitution totaling $14,114,372.38 to Cisco and $343,173.40 to the government, and to forfeit the amounts alleged in the forfeiture count. Gordon also agreed to waive his right to appeal his "convictions, the judgment, and orders of the Court," in addition to the right to appeal his sentence. The government reserved the right in the plea agreement to argue for additional restitution for Cisco's "lost opportunity" costs for the Terayon shares, investigation costs, and prejudgment interest.

The district court sentenced Gordon to a term of 66 months in prison. The court scheduled a further hearing pursuant to 18 U.S.C. § 3664(d)(5) to address the disputed issues of restitution. The court established July 30, 2002 (the date of Gordon's guilty pleas) as the cut-off date for prejudgment interest. The district court subsequently issued an order addressing the areas of restitution and forfeiture that were not contested by the parties and conducted an evidentiary hearing regarding the remaining

disputed restitution issues. In the court's Final Order of Restitution, Gordon was ordered to pay restitution totaling $27,397,206.84, including:

(1) $12,593,902.23 for the embezzled Terayon shares;

(2) prejudgment interest of $2,424,913.32; and

(3) reimbursable investigation costs totaling $1,038,477.00.[1]

Both the Final Order of Restitution and Final Order of Forfeiture were incorporated into the Amended Judgment. Gordon timely appealed.

II. DISCUSSION

A. Waiver of Right to Appeal

We review de novo the question of whether a defendant has validly waived his statutory right to appeal. *United States v. Anglin*, 215 F.3d 1064, 1066 (9th Cir.2000). A defendant's right to appeal is statutory, rather than constitutional, in nature. *Id.* Knowing and voluntary waivers of appellate rights in criminal cases are "regularly enforce[d]." *Id.* "The sole test of a waiver's validity is whether it was made knowingly and voluntarily." *Id.* at 1068; *see also United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir.1996) (noting that the "proper enforcement of appeal waivers serves an important function in the judicial administrative process by preserving the finality of

[1] Cisco initially sought reimbursement of $1,268,022 for its investigation costs through July 30, 2002. At the restitution hearing, Cisco reduced its request in two categories by a total of $25,761.

judgments and sentences imposed pursuant to valid plea agreements") (quotation marks and citation omitted).

The government argues that because Gordon waived the right to appeal the "orders of the Court" in his plea agreement, he waived his right to appeal the restitution order. At Gordon's plea colloquy, the district court also emphasized its view that Gordon had waived the right to appeal the restitution order. We disagree. Gordon lacked sufficient notice to waive his right to appeal the restitution award. As we held in *United States v. Phillips*, 174 F.3d 1074 (9th Cir.1999), while "[i]t is true that a court can impose restitution when the plea agreement is silent as to the amount of restitution as long as the amount is based on actual damages[,]. . . . [a]llocating actual damages in this manner . . . carries with it a requirement of notice to the defendant." *Id.* at 1076. "Notice was absent in this case due to the ambiguous nature of the plea agreement." *Id.* Gordon's "plea agreement was unclear about exactly what the amount of actual damages would be" for such contested issues as the embezzled Terayon shares, prejudgment interest, and investigation costs. *Id.* Gordon therefore did not waive his right to appeal these contested amounts.

Moreover, "[e]ven if [Gordon] had voluntarily and knowingly waived his general right to appeal, this waiver would not affect his ability to appeal a violation of the[MVRA]." *Id.* A "restitution order which exceed[s] its authority under the [MVRA] is equivalent to an illegal sentence." *Id.* (citation omitted). "[S]uch a restitution order [is] in excess of the maximum penalty provided by statute and, therefore, the waiver of appeal [is] inapplicable to it." *Id.* (quotation marks omitted).

B. Restitution Order

"A restitution order is reviewed for an abuse of discretion, provided that it is within the bounds of the statutory framework. Factual findings supporting an order of restitution are reviewed for clear error. The legality of an order of restitution is reviewed de novo." *United States v. Stoddard*, 150 F.3d 1140, 1147 (9th Cir.1998) (citations omitted).

The largest item that Gordon challenges is the district court's restitution award for the embezzled Terayon shares. Gordon argues that in calculating Cisco's losses for the Terayon shares, the district court applied an incorrect "date of the loss" under the MVRA. He also contends that the district court erroneously disregarded the alleged fraudulent inflation of Terayon shares, which he posits constituted an "intervening cause" of Cisco's Terayon related loss. In addition, Gordon argues that the district court abused its discretion in failing to subtract brokerage house commissions costs from its restitution award, in including Cisco's investigation costs as part of its total losses, and in awarding prejudgment interest for the embezzled securities and cash.[2]

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[2] In his July 14, 2004 "Motion for Order Allowing Challenge to Restitution Based on *Blakely v. Washington*," Gordon asked to be allowed to challenge the restitution order, based in part upon factual determinations made by the district judge, as unconstitutional under the Supreme Court's recent decision in *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). We grant the motion and therefore consider Gordon's constitutional challenge to the district court's restitution award. Gordon's *Blakely* argument is foreclosed by our recent decision in *United States v. DeGeorge*, 380 F.3d 1203 (9th Cir.2004), where we held that a "restitution order made by the district court pursuant to the Victim and Witness Protection Act . . . is unaffected by *Blakely*." *Id.* at 1221.

1. Terayon Shares

Cisco acquired 896,834 Terayon shares in 1995. In December 1998, Gordon, without Cisco's consent, sold short 54,525 of Cisco's Terayon shares. He deposited the $1,635,692 in proceeds from the sale into his brokerage account. In June 1999, Gordon embezzled an additional 100,000 Terayon shares from Cisco's account. He later deposited the shares into his brokerage account and eventually sold them for a total of $7,478,782.93.

a. "Date of the Loss" Provision

Before Gordon's embezzlement was discovered, Cisco sold all of its holdings of Terayon stock. Specifically, Cisco sold all of its shares between July 21, 1999 and March 6, 2001. During this period, the price of Terayon jumped from $46 per share on July 21, 1999 to a high of $285.26 per share on March 9, 2000.[3] The stock price dramatically declined, however. On March 6, 2001, the day Cisco liquidated the last of its Terayon shares, the stock's closing price was $5.47 per share. Cisco, which had no knowledge that Gordon had taken some of its Terayon holdings, would have sold these shares as well except for Gordon's wrongdoing.

In situations where the return of stolen or embezzled property is impossible, impracticable, or inadequate, the MVRA requires defendants to pay victims "the greater of (I) *the value of the property on the date of the* damage, *loss*, or destruction; or (II) the value of the property on the date

[3] These share prices are the day-high values.

of sentencing." 18 U.S.C. § 3663A(b)(1)(B)(i)(I)-(II) (emphasis added). In determining the "date of the loss" for the Terayon shares, the district court reasoned that it was "reasonable, equitable and consistent with the purposes of the restitution statute to consider Cisco's lost opportunity to sell the Terayon shares at a higher price in determining the amount of the loss caused by Defendant's embezzlement of the shares." To reflect Cisco's "lost opportunity" to sell the Terayon shares, the district court held that the "date of the loss" for the embezzled Terayon shares was the date on which it could reasonably be inferred that Cisco would have sold the shares if Gordon had not embezzled them.[4] In these circumstances, though, no single date could be identified, only a range of dates, so the district court calculated the loss using the average closing price of Terayon shares during the entire period in which Cisco liquidated its shares (July 21, 1999 through March 6, 2001). Using calculations that are not themselves disputed, the district court arrived at a restitution figure for the Terayon shares of $12,593,902.23.[5] Gordon argues

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[4] Because the district court expressly tied the award to the shares' value on the "date of the loss," we regard the dissent's citation to *United States v. Angelica*, 859 F.2d 1390 (9th Cir.1988), as misplaced. *See* dissent at 1061-62. In *Angelica*, we rejected an award based on the property's value at the time of purchase. 859 F.2d at 1394. Here the district court did not disregard the statute's "choice of two possible dates," *id.*, but rather exercised its discretion in giving meaning to the first of those statutory choices.

[5] In addition to the Terayon shares, Gordon also embezzled Microsoft, Internet Security Systems (ISSX), Convergent Networks, Cabletron, and Broadcom securities. No restitution was ordered for the Convergent stock certificates because Gordon surrendered them to the government. In the cases of Microsoft, ISSX, and Broadcom, the restitution amount was determined, by agreement of the parties, by taking the greater of the dayhigh value for each stock on the date it was taken or the day-high value on the date of sentencing. The district court

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that the "date of the loss" should have been the date that the Terayon shares were embezzled, or the "taking date," with a corresponding loss valuation of $6,523,192, more than $6 million less.

The MVRA offers no further elaboration on the "date of the loss" provision. Because it is unclear whether the district court's average stock price valuation method is consistent with the text of the statute, we "must consider '[t]he purpose, the subject matter, the context [and] the legislative history' of this statute." *United States v. Miguel*, 49 F.3d 505, 507 (9th Cir.1995) (quoting *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 313, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978) (alterations in original)). As there is no discussion within the MVRA's legislative history regarding the "date of the loss" provision, we turn to the remedial principles underlying the MVRA and restitution generally.[6]

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reasoned that because Cisco had not completely liquidated these securities (unlike Terayon), it would have been speculative to try to determine whether Cisco might have sold the embezzled shares, when it still had other shares of the same companies in its portfolio.

As the government concedes, the district court failed to treat the Cabletron shares, which Cisco also sold off in their entirety by the time of the plea agreement, in a manner consistent with its treatment of the Terayon shares. Cisco's complete liquidation of Cabletron was not known at the time of the plea agreement by Gordon or the government. When the true facts came to light, as Gordon acknowledges, the government offered to correct the error. Because the district court apparently did not adopt the government's correction, we order the district court on remand to recalculate restitution as to the Cabletron shares in a manner consistent with its treatment of the Terayon shares.

[6] Gordon argues that we should also look to the Sentencing Guidelines for the measure of loss. In sentencing a defendant for fraud the district court must make a "reasonable estimate" of the victim's "loss." U.S.S.G. § 2B1.1 app. n. 3(C). The general rule in a case involving property obtained by fraud is that the measure of loss is "[t]he fair

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"[W]e are presented with a statute[,] the primary and overarching goal of which is to make victims of crime *whole*, to *fully* compensate these victims for their losses and to restore these victims to their original state of well-being[,] that expressly directs the sentencing judge to award restitution in an amount equal to 'the value of the property on the date of the damage, loss, or destruction.'" *United States v. Simmonds*, 235 F.3d 826, 831 (3d Cir.2000) (interpreting MVRA) (emphasis added). As we noted in the general restitution context in *Nelson v. Serwold*, 687 F.2d 278 (9th Cir.1982), the "purpose of restitution is . . . to restore the defrauded party to the position he would have had *absent* the fraud." *Id.* at 281 (emphasis added).

Guided by the remedial purposes underlying the MVRA, other circuits have granted district courts a degree of flexibility in accounting for a victim's complete losses. For example, in *Simmonds*, the Third Circuit concluded that the district court did not abuse its discretion in

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market value of the property unlawfully taken." *Id.* app. n. 3(C)(i). As noted above, the MVRA's purpose is to make the victims whole; conversely, the Sentencing Guidelines serve a punitive purpose, necessitating a different loss calculation scheme than the MVRA. *Compare United States v. Bae*, 250 F.3d 774, 777 (D.C.Cir.2001) (noting that under the Sentencing Guidelines "[l]ost profit is an undesirable measure of loss" because it "would *penalize* frauds differently depending upon whether the victim is a consumer or a producer") (emphasis added) *with United States v. Rice*, 38 F.3d 1536, 1544 (9th Cir.1994) (holding under the VWPA that lost profits *are* permissible and determinable on the date of the taking for restitution purposes because the property had a "book price which includes a profit markup"). While there is little logic in increasing or decreasing a defendant's sentence as a result of unpredictable fluctuating values for misappropriated items in the punitive context, accounting for such fluctuations is necessary in making victims whole in the restitutionary context.

calculating the value of the victims' furniture destroyed in a fire under § 3663A at its "replacement value" – that is, "the amount of money necessary to replace the furniture" – rather than at its "market value" – or "the actual price that the furniture in question would have commanded on the open market on the *date* of destruction." 235 F.3d at 830 (emphasis added). The court reasoned that because "furniture often has a personal value to its owners that cannot be captured or accurately estimated by simply determining the market value of the furniture" on a particular date, the district court properly concluded that the replacement value was a more accurate means of accounting for the victims' total losses under the MVRA. *Id.* at 832.

Similarly, other circuits interpreting the MVRA have permitted a degree of flexibility in making victims of securities fraud whole by allowing district courts to place the risk of downward fluctuations in stock prices on defendants rather than victims. In *United States v. Rhodes*, 330 F.3d 949 (7th Cir.2003), the Seventh Circuit affirmed the district court's restitution order under the MVRA, which ordered the defendant, who defrauded a number of investors, to pay his former employer "the amount of money Magna Investments had to dole out in order to make its customers whole as a result of [the defendant's] fraud." *Id.* at 953. The defendant argued that the district court's order was improper under the MVRA because his former employer "immediately liquidated the unauthorized investments [the defendant] had made, thereby incurring losses caused by a dip in the values of those investments and the fact that at least some of the investments were sold before their maturation date." *Id.* Rejecting this argument, the Seventh Circuit reasoned that the defendant should bear

the risk of declining stock prices, not the victim: "'[the defendant], rather than the victims, should bear the risk of forces beyond his control. . . . [T]o the extent that the interest rates have come into play in calculating the amount of loss, they have done so due to [the defendant's] own conduct.'" *Id.* (quoting district court opinion); *cf. Nelson*, 687 F.2d at 281 (holding that "where a person with knowledge of the facts wrongfully . . . acquires property . . . of fluctuating value, such as stock, the injured party may be awarded an amount equal to the highest value reached by the stock within a reasonable time *after* the tortious act" (emphasis added)).

The district court's "date of the loss" determination is consistent with the remedial purposes underlying the MVRA and restitution generally. The district court reasonably construed the loss to Cisco concerning the Terayon stock to be its inability to liquidate the stock between July 21, 1999 and March 6, 2001 and therefore the "date of the loss" to be each possible date within that particular period. Absent Gordon's illegal conduct, which notably included the purposeful concealment of his misappropriations, Cisco would have had the opportunity to sell the embezzled stock at a given market value on *each* possible date, which it clearly intended to do.[7]

Because Cisco lacked knowledge as to Gordon's activities, it was unable to liquidate the embezzled Terayon shares throughout this period. The district court therefore concluded that Gordon, rather than Cisco or the

[7] The court's average or mean stock price measure was a reasonable manner to account for Cisco's total losses. Gordon's argument that the district court should have applied the median stock price is unsupported by law or reason.

government, should bear the risk associated with the fluctuations in Terayon's share value.

A brief examination of the "taking" date, the alternative "date of the loss" proposed by Gordon, illustrates the reasonableness of the district court's restitution method in making Cisco "whole" under the MVRA. On the date of Gordon's first "taking" of 54,525 shares, December 14, 1998, Terayon's day-high value was $30.12 per share. On the date of Gordon's second taking of 100,000 shares, June 24, 1999, Terayon's day-high value was $48.88 per share. But it is undisputed that (1) Cisco did not know on these dates that the shares had been taken, (2) Cisco did not intend to sell any Terayon shares on these dates, and (3) Cisco did sell all of its Terayon shares, mostly for prices higher than these, before Gordon's embezzlement was detected. Under those circumstances it is plain that limiting the restitution amount to the value of the shares on the date Gordon secretly stole them would underestimate Cisco's loss. But for Gordon's misconduct, Cisco would have sold those shares at higher prices and would have made substantially more money. The "taking" date is an appropriate "date of the loss" for the other securities that Cisco did not completely liquidate because it is too speculative to conclude that Cisco would have sold those securities absent Gordon's wrongdoing. In the Terayon context, however, the district court sensibly concluded that the "taking" date would have prevented the district court from accounting for Cisco's total losses.

That said, it is important to note that the legislative history of the VWPA demonstrates that Congress intended the restitution process to be quick and reasonable. *See* S.Rep. No. 97-532, at 31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2537 ("[W]here the precise amount [of

restitution] owed is difficult to determine, [18 U.S.C. § 3664] authorizes the court to reach an expeditious, reasonable determination of appropriate restitution by resolving uncertainties with a view toward achieving fairness to the victim."). While the district court did engage in a fairly sophisticated analysis in determining the restitution amount for the Terayon shares, the record demonstrates that it was not so complex as to be unreasonable, burdensome, or dilatory. Moreover, the court's calculations were undertaken with a view toward achieving fairness to the victim.

To be clear, we do not hold that the district court was required to undertake this particular restitution exercise in determining the "date of the loss" for the embezzled Terayon shares.[8] Rather, we only hold that the district court did not abuse its discretion in doing so.[9]

b. Intervening Cause

Gordon argues in the alternative that the district court abused its discretion in including in its determination of the average Terayon share value the price of

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[8] We thus disagree with the dissent's contention that "a judge who does not wish to engage in the complex exercise approved of here will have to . . . entertain it in order to see if it can be discretionarily rejected." Dissent at 1062. Although parties may argue as much, *id.* at 1062 n. 2, these arguments should not succeed, since the complexity of the determination is itself one of the factors the court may properly weigh. As a matter of logic, our limited holding – that the district court did not abuse its discretion by engaging in this exercise – does not indicate that the dissent's inverse proposition is also true.

[9] As noted above in footnote 5, the district court is ordered on remand to recalculate restitution for the embezzled Cabletron shares in a manner consistent with its treatment of the Terayon shares.

Terayon stock between July 21, 1999 and July 12, 2000 because, he contends, during that period Terayon's share price was fraudulently inflated. He cites a pending class action lawsuit in support of his assertion that a "dramatic spike" in Terayon's share price coincided with false statements by Terayon insiders. Gordon describes the spike as an "intervening cause" to Cisco's loss. He does not allege that Cisco was involved or aware of such alleged false statements.

"[T]he main inquiry for causation in restitution cases [is] whether there was an intervening cause and, if so, whether this intervening cause was directly related to the offense conduct." *United States v. Meksian*, 170 F.3d 1260, 1263 (9th Cir.1999). The purported "intervening cause" in this case – the alleged fraudulent inflation of the price of Terayon stock – is not "an intervening cause" because it did not "cause" the loss to Cisco, but merely adversely affected the value of the property that Gordon embezzled. Though the extent of Cisco's loss may have been affected by outside forces, Gordon's conduct – and his alone – directly resulted in the loss. *Cf. Rhodes*, 330 F.3d at 953 ("'[The defendant], rather than the victims, should bear the risk of forces beyond his control. . . .'" (quoting district court opinion)); *Meksian*, 170 F.3d at 1263 (reversing a restitution order and concluding that the loss to the lender was caused *not* by the defendant's false tax returns but "by the contaminated nature of the loan property" and by the lender's reliance on an inaccurate environmental risk report prepared by a third party). Moreover, even if Gordon's claims regarding an inflated stock price were true, there is no reason to believe that, absent Gordon's conduct, Cisco would have been prevented from selling the Terayon shares and realizing whatever premium may have

been generated by such alleged fraudulent behavior. The market prices were available to Cisco, no matter how the market prices came to be.

It would have been unreasonable, in any event, to expect the district court to discount accurately the restitution amount to reflect as of yet unproved fraudulent behavior alleged in pending litigation among third parties. As noted above, the legislative history of the VWPA demonstrates that Congress intended the restitution process to be quick and reasonable. *See* S.Rep. No. 97-532, at 31.

We therefore conclude that the district court did not abuse its discretion in declining to take into account the alleged fraudulently induced spike in the value of Terayon shares.

2. Brokerage House Commissions

Gordon contends that to be an accurate approximation of the "lost opportunity" loss, the restitution amount would have to be based on the net proceeds to Cisco *after* brokerage commissions costs. Without accounting for brokerage commission costs, the restitution order arguably compensates Cisco for more than it ultimately lost. *See United States v. Quillen*, 335 F.3d 219, 222 (3d Cir.2003) (noting that restitution under the MVRA "must be limited to 'an amount pegged to the *actual* losses suffered by the victims of the defendant's criminal conduct'") (quoting *United States v. Barany*, 884 F.2d 1255, 1260-61 (9th Cir.1989)).

The record is insufficient, however, to allow a court to deduct accurately the commissions from the restitution award. The pages of the record Gordon points to are merely receipts from various brokerages houses that show

the commission paid on sales of certain blocks of shares. Nothing within the record provides a commission percentage rate for a particular brokerage house or a detailed list of which securities were bought and sold through which houses. 18 U.S.C. § 3664(a) directs that before making an order of restitution, the district court should review, to the "extent *practicable*, a complete accounting of the losses." *Id.* (emphasis added). Because the record does not indicate what percentage of shares Cisco bought and sold through which particular brokerage houses, or what the commission rates for each house were, the district court reasonably concluded that it would have been impractical for it to account for the brokerage house commissions in its restitution award.

Given that Congress intended the restitution process to be expedient and reasonable, with courts resolving uncertainties with a view toward achieving fairness to the victim, we hold that the district court did not abuse its discretion in declining to account for the brokerage house commissions.

3. Investigation Costs

Gordon also argues that the district court abused its discretion in ordering him to pay Cisco's investigation costs. 18 U.S.C. § 3663A(b) provides in relevant part:

> (b) The order of restitution shall require that such defendant –
>
> . . .
>
> (4) in any case, reimburse the victim for lost income and necessary child care, transportation, and *other expenses incurred during participation*

> *in the investigation or prosecution of the offense* or attendance at proceedings related to the offense.

Id. (emphasis added).[10]

"This circuit has adopted a *broad* view of the restitution authorization [for investigation costs]." *United States v. Phillips*, 367 F.3d 846, 863 (9th Cir.2004) (citation omitted) (emphasis added). Generally, investigation costs – including attorneys' fees – incurred by private parties as a "direct and foreseeable result" of the defendant's wrongful conduct "may be recoverable." *Id.; see also United States v. Cummings*, 281 F.3d 1046, 1051-53 (9th Cir.) (holding that the district court properly included in the restitution order attorney's fees incurred by a mother in separate state and international proceedings to recover children whom the defendant wrongfully removed), *cert. denied*, 537 U.S. 895, 123 S.Ct. 179, 154 L.Ed.2d 162 (2002); *United States v. Hayward*, 359 F.3d 631, 642 (3d Cir.2004) (holding that the district court correctly concluded that parents were entitled to restitution under the MVRA for "reasonable costs in obtaining the return of their victimized children from London and in making their children available to participate in the investigation and trial"); *United States v. Piggie*, 303 F.3d 923, 928 (8th Cir.2002) (concluding, under plain error review, that the district court properly included in a restitution order investigation costs and fines that a university incurred because they were caused by the

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[10] Gordon agreed in his plea agreement that he would be required to "reimburse [Cisco] for necessary . . . expenses incurred during participation in the investigation and prosecution of the offense" pursuant to 18 U.S.C. § 3663A(b)(4), but reserved the right to contest the amounts claimed.

defendant's conduct), *cert. denied*, 538 U.S. 1049, 123 S.Ct. 2114, 155 L.Ed.2d 1090 (2003).

The district court reasonably concluded that Cisco's investigation costs, including attorneys' fees, were necessarily incurred by Cisco in aid of the proceedings. Cisco's investigation costs were a direct and foreseeable result of Gordon's actions. The record demonstrates that Cisco's investigation costs were incurred in response to five grand jury subpoenas and a number of government requests requiring Cisco to analyze vast amounts of documentation and electronic information. Cisco was required to retrieve every item regarding its investments in 20 companies that were the subject of possible insider trading by Gordon, and over 40 companies that were identified as candidates for Gordon's possible embezzlement of Cisco-owned shares or proceeds. Cisco was forced to identify and reconstruct hundreds of sales and acquisitions from which Gordon might have been able to embezzle proceeds. Gordon purposefully covered his tracks as he concealed his numerous acts of wrongdoing from Cisco over a period of years. As the victim, Cisco cannot be faulted for making a concerted effort to pick up his trail and identify all the assets he took amid everything he worked on.

The district court carefully analyzed Cisco's requests. Cisco's investigation included a forensic analysis of Gordon's computer to determine whether the "eliminated" evidence could be restored. The district court reduced the award for this analysis, finding that the evidence "does not support fully the extraordinary expense associated with Cisco's attempt to recover data from Defendant's laptop computer," and made other reductions, finding that "several categories for which expenses are claimed are at least to some extent overlapping or duplicative." Indeed, the

district court ultimately ordered reimbursement for $1,038,477 of the total of $1,268,022 for which Cisco had sought reimbursement.

We therefore conclude that the district court did not abuse its discretion in awarding restitution for Cisco's investigation costs.

4. Prejudgment Interest

The district court awarded prejudgement interest on all assets, both cash and stock. For all assets excluding the Terayon shares, the district court set the interest accrual date as the date the assets were taken by Gordon, and the interest termination date as July 30, 2002.[11] The district court applied the prevailing government interest rate in effect on the date of the misappropriation. For the Terayon shares, the district court used a slightly different calculation method. Because the district court concluded that Cisco's Terayon loss occurred between July 21, 1999 and March 6, 2001, when Cisco had completed liquidating the Terayon shares and its losses became "fixed," the court set the accrual date for prejudgment interest as March 6, 2001. The district court also set the interest termination date as July 30, 2002, using the prevailing government interest rate in effect on March 6, 2001.[12]

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[11] The termination date of July 30, 2002 was agreed upon by the parties.

[12] Gordon argues that the district court abused its discretion in not using the then current 1.25% interest rate. Under federal law the rate of prejudgment interest is the Treasury Bill rate as defined in 28 U.S.C. § 1961 unless the district court finds on substantial evidence that a different prejudgment interest rate is appropriate. *See Blanton v.*

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Though the MVRA is silent on the issue of prejudgment interest, we have held that the VWPA "authorizes restitution for a victim's '*actual* losses'" and that "[f]oregone interest is one aspect of the victim's actual loss." *United States v. Smith*, 944 F.2d 618, 626 (9th Cir.1991) (interpreting the VWPA) (emphasis added). A number of other circuits have likewise held that restitution under the MVRA or the VWPA may include prejudgment interest. *See United States v. Shepard*, 269 F.3d 884, 886 (7th Cir.2001) (construing *Government of Virgin Islands v. Davis*, 43 F.3d 41, 47 (3d Cir.1994)) (construing VWPA); *United States v. Hoyle*, 33 F.3d 415, 420 (4th Cir.1994) (construing VWPA); *United States v. Patty*, 992 F.2d 1045, 1050 (10th Cir.1993) (construing VWPA); *United States v. Rochester*, 898 F.2d 971, 983 (5th Cir.1990) (construing VWPA).[13]

Anzalone (*II*), 813 F.2d 1574, 1576 (9th Cir.1987); *Blanton v. Anzalone* (*I*), 760 F.2d 989, 992-93 (9th Cir.1985). We have held that the applicable prejudgment interest rate is the one in effect immediately *prior* to the date of the wrongful conduct which caused a plaintiff's loss. *See Anzalone* (*I*), 760 F.2d at 992-93. Though the district court arguably should have used the rate in effect at the time of Gordon's misappropriations of the Terayon shares, the court's use of the rate in effect on March 6, 2001 is consistent with its view that the harm of Gordon's wrongdoing occurred during the liquidation period. Moreover, Gordon does not raise this argument on appeal. The district court therefore did not abuse its discretion in applying the interest rate in effect on the date of Gordon's wrongful conduct for all assets excluding the Terayon shares, and on March 6, 2001 for the Terayon shares.

[13] The contrary cases cited by the dissent, *United States v. Rico Industries, Inc.*, 854 F.2d 710 (5th Cir.1988), and *United States v. Sleight*, 808 F.2d 1012 (3d Cir.1987), interpreted the Federal Probation Act rather than the VWPA or MVRA. *See* dissent at 1063 & n. 4. In that context, the *Sleight* court noted that while "one purpose of restitution under the Federal Probation Act is to make the victim whole, restitution . . . remains inherently a criminal penalty." 808 F.2d at 1020. The

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Gordon first argues that an award of prejudgment interest is unwarranted in this case because it does not constitute an "actual loss" to Cisco, who, unlike the victim in *Smith*, is not a "financial institution" that has a "tangible expectation" to earn interest on its cash reserves. Additionally, Gordon contends that if interest should apply to any of the securities, it should only apply to the Terayon shares, because by Cisco's admission, the other securities would have been held had Gordon not embezzled them. We consider each argument in turn.

Gordon's first argument is unavailing. "Prejudgment interest reflects the victim's loss due to his inability to use the money for a *productive* purpose, and is therefore necessary to make the victim whole." *Patty*, 992 F.2d at 1050 (emphasis added). In *Smith* we held that this proposition is particularly true when the victim is a financial institution because "[f]oregone interest is one aspect of the victim's actual loss." *Smith*, 944 F.2d at 626. We in no way

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court accordingly applied the "general rule that a criminal penalty does not bear interest." *Id.*

It is apparent that our court and other courts have not applied that rule to restitution under the VWPA or MVRA, since prejudgment interest has been awarded in at least some instances, as the dissent acknowledges. In contrast to the Federal Probation Act, making the victim whole is not "one purpose" of restitution under the MVRA, but rather its "primary and overarching goal." *See Simmonds*, 235 F.3d at 831. In this context, which we regard as restitutionary rather than punitive, *see supra* note 6, Congress's aim "to fully compensate these victims for their losses," *Simmonds*, 235 F.3d at 831, is best served by awarding prejudgment interest where the victim's actual losses include lost opportunities to use property for productive purposes. In specific terms, restitution here is premised on the conclusion that, but for Gordon's criminal acts, Cisco would have sold the shares in question and would have obtained money in return. It is appropriate to recognize the loss of the opportunity represented by the time value of that money.

limited this holding to financial institutions, however. Indeed, other circuits have allowed restitution for prejudgement interest to other parties, such as individuals and family estates. *See Shepard*, 269 F.3d at 886 (awarding prejudgement interest where "the money came from an interest-bearing account" of a defrauded 87-year-old woman); *Davis*, 43 F.3d at 43, 47 (allowing prejudgement interest where the embezzled cash came from "the estate of James Merrills Rice").

As a corporation, Cisco is likewise eligible for prejudgment interest restitution. While Cisco would not necessarily have placed its stock proceeds in an interest bearing account had Gordon not embezzled the securities," interest" is simply a proxy for a "lost opportunity." *See Davis*, 43 F.3d at 47 ("Lost interest translates into lost opportunities, as it reflects the victim's inability to use his or her money for a productive purpose."). The district court's award of prejudgment interest reflects the "productive purposes" for which a profit maximizing entity like Cisco uses its cash reserves.[14]

Gordon's second argument, however, has merit. While the district court appropriately included prejudgment interest for the embezzled cash and the Terayon and Cabletron[15] shares, both of which Cisco completely liquidated,

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[14] Indeed, Cisco's annual financial report contains a separate section devoted to "Interest Income." *See* Cisco Systems, Inc., 2003 Annual Report 25, *available at* http://www.cisco.com/warp/public/749/ar2003/ pdf/AR_6dfinancial_6dreview.pdf.

[15] Though the district court rightly awarded prejudgment interest for the Cabletron shares, it did not take into account the fact that Cisco completely liquidated these stocks. On remand, the district court is ordered to calculate prejudgment interest for the Cabletron shares in a manner similar to its treatment of the Terayon shares, setting the

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the court abused its discretion in awarding prejudgment interest for the other securities. As Cisco acknowledged, it had no intention of completely liquidating the other securities from the date of their taking to the date of judgment. Indeed, it was for this reason that the district court determined that the "date of the loss" for the other securities was the date of the misappropriation. Because it is too speculative to conclude that Cisco would have liquidated these securities and placed the cash proceeds in an interest bearing account or used them for some other productive purpose, prejudgment interest on these securities cannot constitute an "actual loss" to the victim. The district court's award of prejudgment interest for these embezzled stocks goes beyond making Cisco whole and is therefore unauthorized under the MVRA. *See Smith*, 944 F.2d at 626.

We therefore conclude that the district court abused its discretion with regard to its award of prejudgment interest on all securities excluding the Terayon and Cabletron shares.

III. CONCLUSION

Congress passed the MVRA to make victims of crime whole. Mindful of this overarching objective, we are also cognizant of Congress's desire that the restitution process be expedient and reasonable, with courts resolving uncertainties with a view toward achieving fairness to the

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accrual date as the date that the losses became "fixed" (i.e., the date of final liquidation for the Cabletron shares) and the termination date as the agreed date of July 30, 2002, and using the government interest rate in effect on the "fixed" date.

victim. We thus hold that the district court's restitution analysis for the embezzled Terayon shares, including its fairly sophisticated "date of the loss" calculations, was not an abuse of discretion.[16] Nor did the district court abuse its discretion in declining to account for the brokerage house commissions or in awarding restitution for costs incurred by Cisco during its participation in the criminal investigation. Finally, we conclude that the district court did not abuse its discretion in awarding Cisco prejudgment interest in regards to the embezzled cash and shares of the companies Terayon and Cabletron.[17] The district court did, however, abuse its discretion in awarding prejudgment interest for the other embezzled securities.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED. Each party to bear its own costs.

FERNANDEZ, Circuit Judge, concurring and dissenting:

I concur in the majority opinion, with the exception of parts II, B-1 and II, B-4, as to which I dissent.

Congress did, no doubt, want to help make victims of crimes whole when it enacted 18 U.S.C. § 3663A. However, Congress also hoped to avoid creating a system that would, essentially, turn criminal sentencing hearings into

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[16] As noted above in footnote 5, we order the district court on remand to recalculate restitution as to the Cabletron shares in a manner consistent with its treatment of the Terayon shares.

[17] As noted above in footnote 15, we order the district court on remand to recalculate prejudgment interest for the Cabletron shares in a manner consistent with its treatment of the Terayon shares.

complicated, prolonged trials of the normal civil variety. *See* 18 U.S.C. § 3663A(c)(3)(B). Therefore, Congress did not provide that a victim could simply recover the damages that would, or might, be available in a typical civil case. Rather, when it came to defining the nature of restitution in the property area, Congress provided that if an offense resulted "in damage to or loss or destruction of property," and if mere return of the property would be "impossible, impracticable, or inadequate," the miscreant should pay an amount that represented "the value of the property on the date of . . . loss," or "on the date of sentencing," whichever was greater, less the actual value of the part of the property that was returned. *Id.* § 3663A(b)(1).

No doubt, courts can massage and explicate the "date of loss" concept, but no authority supports doing what the district court did here. *See Hughey v. United States*, 495 U.S. 411, 415-18, 110 S.Ct. 1979, 1982-83, 109 L.Ed.2d 408 (1990) (scope and amount of restitution limited by language of statute authorizing issuance of restitution order);[1] *Gamma Tech*, 265 F.3d at 927-28 (affirming restitution order that set victim's loss as of time of overpayment on contracts procured

[1] *Hughey* and other cases cited in this section discuss § 3663 (or its predecessor statute formerly codified at 18 U.S.C. § 3579) whereas Gordon's restitution was ordered under § 3663A. Section 3663 *permits* restitution for crimes that do not fall within § 3663A, whereas § 3663A *mandates* restitution for certain specified crimes. The relevant text in each section, is the same. *Compare* 18 U.S.C. § 3663(b)(1), *with id.* § 3663A(b)(1). *Hughey* was modified by enactment of and amendments to § 3663, but the differences do not involve the merits of Gordon's challenges to his restitution order. *See Hughey,* 495 U.S. at 413 n. 1, 110 S.Ct. at 1981 n. 1 (discussing recodification of §§ 3579-80 at §§ 3363-64); *United States v. Gamma Tech Indus., Inc.*, 265 F.3d 917, 927 n. 10 (9th Cir.2001) (describing effect of amendments to § 3663 on the holding of *Hughey*).

through illegal kickbacks). Indeed, when interpreting identical language of an earlier criminal restitution statute, in a case where the victims had purchased diamonds at an earlier time and were then fraudulently induced to send them to the defendant to sell, we stated:

> The VWPA grants the sentencing judge substantial discretion over the entire process leading to an ultimate restitution order. As part of the process, the judge must decide in a particular case, whether the imposition of the order will unduly complicate or prolong the sentencing process. Here, the district court determined the amount of restitution based upon evidence presented at trial and in a presentence report showing the value of the diamonds at the time they were initially purchased by the victims. . . . While the district court has discretion in ordering restitution, . . . the award must be within the statutory framework. Because the amount of restitution ordered in this case was based neither on the value of the diamonds on the date of loss, nor on their value at the date of sentencing, the restitution order was beyond the authority granted by the statute. Although valuing the diamonds as of the date of loss or sentencing may present a difficult determination for the district court, the choice of two possible dates of valuation is stated unambiguously in [the VWPA]. We must therefore remand to the district court for valuation of the diamonds on one of those two dates.

United States v. Angelica, 859 F.2d 1390, 1394 (9th Cir.1988) (internal quotation marks and citations omitted).

It seems to me that when an item is stolen from someone, that is the date upon which the person lost it. The concept that he lost it on some other date to be determined

in the future, perhaps many years later, does not take account of the normal use of language. Usually we think of something as "lost" when it has been parted with or when it has gone out of our possession. That is the date that we suffer our loss.

Of course it can be argued that if the person had kept the item it would have been worth a lot more a few years later, or a lot less, or at some point more and at a later point even less, but that is decidedly not the date that the property was lost; it is not the date that Congress selected. Congress selected the date that the loss truly occurred; that is when the property was lost to the victim.

Nor am I able to accept the proposition that the property is not lost until the victim knows that it is gone. When a diamond is stolen from a victim's jewelry box, or a share of stock from his portfolio, it is lost to him, whether he knows that or not. Surely the date that he loses the piece of property should not depend upon the sophistication of his inventory process, or upon his memory of precisely where it ought to be at some precise time. It is undoubtedly lost on the date it is taken from him, regardless of how quickly he discovers that.

Finally, the thought that a district court can choose to adopt the complex system of deciding loss that was adopted by the district court in this case, or can choose to adopt some other view of when a loss takes place, does not help very much. Discretion in the legal world is not the unfettered right to do whatever you like. We have always been admonished that, at the very least, the asymptotes bounding judicial discretion are composed of a proper assessment of the facts and the law. *See, e.g., Koon v. United States*, 518 U.S. 81, 97-100, 116 S.Ct. 2035, 2046-47, 135

L.Ed.2d 392 (1996); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990); *Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC*, 339 F.3d 1146, 1150 (9th Cir.2003); *Montrose Chem. Corp. of Cal. v. Am. Motorists Ins. Co.*, 117 F.3d 1128, 1133 (9th Cir.1997); *United States v. Schlette*, 842 F.2d 1574, 1577 (9th Cir.1988); *cf. Olvera v. Giurbino*, 371 F.3d 569, 573-74 (9th Cir.2004) (saying that it has discretion but *must* exercise it in a particular way). Thus, a judge who does not wish to engage in the complex exercise approved of here will have to try it out first – entertain it in order to see if it can be discretionarily rejected.[2] He may even have to consider other more complex possibilities. That, again, is far from calculating the values on one of the two easily determined discreet dates selected by Congress.[3]

In addition, I see no basis for considering prejudgment interest to be a part of criminal restitution where an item of property was taken, and we are referred to no case where that has been done. In fact, absent other facts, it is rank speculation to say that if a person had the asset,

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[2] We engage in self hypnosis when we think that this case will not be used to argue that a district court has abused its discretion if it has failed to consider the factors outlined in the majority opinion. As we have so often seen, a panel's bewitching of itself will not ensorcel either counsel or other judges once a decision is on the books.

[3] In fact, in the case at hand the district court had no clue about what date to use. Why not say that Cisco would have sold the embezzled shares on the date the price was lowest, which was when it sold its remaining shares? Or highest? Or . . . ? And if the principle spelled out by the majority does not apply where Cisco failed to sell all shares of a security because it is too speculative to say it would have sold the embezzled shares (*see* footnote 5 of the majority opinion), why is it not equally speculative to say that Cisco would have sold any of the embezzled shares before the date of its last sale?

whatever it was, he would have kept it, or earned interest on it, or earned interest on the equivalent of its value.

In fact, every similar case that I have discovered deals with a situation where the property taken was "money," and that money was being loaned at a given interest rate or was contained in an interest bearing account or instrument when it was taken. *See, e.g., United States v. Morgan*, 376 F.3d 1002, 1014 (9th Cir.2004) (contractual interest on credit card charges); *United States v. Smith*, 944 F.2d 618, 620, 626 (9th Cir.1991) (defendant falsified loan applications and subsequently defaulted on inadequately secured loans); *see also United States v. Shepard*, 269 F.3d 884, 886 (7th Cir.2001) (money stolen from interest-bearing account); *Virgin Islands v. Davis*, 43 F.3d 41, 46-47 (3rd Cir.1994) (fraudulently acquired certificates of deposit); *United States v. Hoyle*, 33 F.3d 415, 416-18, 420 (4th Cir.1994) (student loan fraud); *United States v. Patty*, 992 F.2d 1045, 1047-48, 1049-50 (10th Cir.1993) (bank loan fraud); *United States v. Rochester*, 898 F.2d 971, 982-83 (5th Cir.1990) (restitution included outstanding balance and accrued interest on bank loan); *cf. United States v. Simpson*, 8 F.3d 546, 548, 552 (7th Cir.1993) (affirming a restitution award that included interest on some victims' losses from fraudulent investment schemes where swindler had, inter alia, misrepresented guaranteed rate of return); *United States v. Stephens*, 374 F.3d 867, 869-70 (9th Cir.2004) (restitution order for past due child support payments may include prejudgment interest where state law mandates that interest be paid on delinquent child support obligations). Indeed, where the misappropriated property, although cash or cash equivalent, was not interest bearing property, other circuits have determined that restitution does not properly include prejudgment

interest because "a criminal penalty does not bear interest," and the courts were hesitant to infer additional criminal penalties beyond those specifically provided by statute. *See United States v. Rico Indus., Inc.*, 854 F.2d 710, 711-12, 714 (5th Cir.1988) (reversing order to pay prejudgment interest on amount ordered to be paid as restitution for criminal kickback scheme); *United States v. Sleight*, 808 F.2d 1012, 1014-15, 1020 (3d Cir.1987) (same).[4] In a true money-at-interest case, the interest can be said to be a part of the property taken on the date of the loss itself, or, at worst, on the date of sentencing. Either the miscreant has agreed to pay interest, or the funds from which the money were taken did pay interest. At any rate, those cases are no authority for the proposition that prejudgment interest should be awarded each time an item has been lost to one of society's rascals or rogues.

Of course, nothing I have said is intended to detract from or denigrate a victim's multitudinous remedies in a typical civil case. But a typical civil case is designed to explore the many nuances involved in determining just how much damage was inflicted upon the victim by the wrongdoer. As we all know, that can involve months and years of litigation, expensive discovery proceedings, motion proceedings, and all of the other things that go into the mix of arriving at a just result in a civil case. That is not this case. In fine, we should not inflict this sort of thorny complexity upon all of the district courts in this circuit, even if a few district judges enjoy embracing this genus of legal cacti.

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[4] Restitution in *Rico* and *Sleight* was awarded under the Federal Probation Act, which, like § 3663A, made no reference to prejudgment interest. *See Sleight*, 808 F.2d at 1019.

Thus, I concur, except in the portions already indicated, as to which I respectfully dissent.

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ROBERT GORDON, Defendant.	Case No. CR-01-20077 JF MEMORANDUM OF INTENDED DISPOSITION OF SUBMITTED ISSUES RE RESTITUTION (Filed Jun 02, 2003)

On May 27, 2003, the Court held a formal restitution hearing in the above-entitled criminal case. The parties submitted live testimony, voluminous documentary evidence and pre-and post-hearing briefs in support of their respective legal and factual positions. By this memorandum, the Court indicates its intended disposition of submitted issues concerning the appropriate valuation for purposes of restitution of Terayon Corporation stock embezzled by Defendant, the appropriate sum to be awarded to Cisco Systems, Inc. ("Cisco") as restitution for its costs of investigation, and the appropriate amount to be awarded to Cisco as pre-judgment interest. Counsel for the United States is directed to prepare a formal order consistent with the views expressed herein.

1. Valuation of Terayon Stock

The Court is satisfied that it is reasonable, equitable and consistent with the purposes of the restitution statute

to consider Cisco's lost opportunity to sell the Terayon shares at a higher price in determining the amount of the loss caused by Defendant's embezzlement of the shares. By this measure, the loss is deemed to have occurred on the date the shares would have been sold had they not been embezzled rather than the date Defendant embezzled them. At the Court's direction, the government presented evidence at the hearing that established Cisco's pattern and practice with respect to the disposition of its Terayon stock during the period of Defendant's embezzlement.

On the basis of the evidence presented, the Court will find and conclude that the most reasonable method for determining the value of the embezzled shares is the average closing price of Terayon stock between July, 21, 1999 and March 6, 2001. Although the government showed at the hearing that Cisco had disposed of all but 125,000 shares of Terayon (equivalent to 62,500 pre-split shares) as of July 12, 2000 and would have done so even if Defendant had not embezzled any shares, there is no way to determine when or to what extent the actual shares embezzled by Defendant would have been liquidated within that time frame. The "ninety-ten" approach suggested by the government in its closing brief, while implicitly recognizing this problem, ultimately is a variant of the "pro-rata" method already rejected by the Court. What *is* known is that Cisco liquidated the last of its Terayon holdings on March 6, 2001, and that all of the shares embezzled by Defendant thus necessarily would have been sold by that date.

The Court has reviewed the parties' respective calculations of the average closing price of Terayon stock for the relevant period and will adopt the calculation contained in Exhibit 5 to the government's closing brief. Defendant's

contentions that the amount of the loss should be reduced to reflect sales costs and commissions and the alleged fraudulent inflation of the price of Terayon stock between November 15, 1999 and April 11, 2000 are not supported by the record. Accordingly, the amount of restitution for the Terayon stock will be fixed at $12,593,902.23.

2. Investigative Costs

The Court has considered the declaration and live testimony of Cisco Vice-President Si White and has reviewed at length the so-called "Blue Binder" containing documentation of Cisco's investigative costs in connection with the criminal investigation and prosecution of Defendant. The majority of the costs, including legal fees, appear to have been reasonably and necessarily incurred by Cisco in aid of the present proceedings. Cisco conceded at the hearing that $25,761 claimed for "restitution analysis" and "research on restitution" should be excluded. The Court finds and concludes that additional reductions are appropriate for two reasons. First, as suggested by Defendant at the hearing, several of the categories for which expenses are claimed are at least to some extent overlapping or duplicative. Second, the testimony and documentary evidence provided by the government at the hearing does not support fully the extraordinary expense associated with Cisco's attempt to recover data from Defendant's laptop computer.

Accordingly, using the ten categories identified by Mr. White in his declaration, the Court will fix Cisco's reimbursable investigative costs as follows:

1.	Laptop analysis and recovery	$ 276,691.00
2.	Transaction identification and prioritization	$ 59,626.00

3.	Transaction analysis	$	309,628.00
4.	Document identification, organization, etc.	$	87,888.00
5.	Restitution analysis	$	8,000.00
6.	Investigation, rebuttal of Defendant's explanations	$	6,183.00
7.	Investigation of insider trading	$	53,092.00
8.	Research on restitution	$	1,000.00
9.	Preparation for and meetings with U.S. Attorney	$	36,959.00
10.	Investigation coordination and monitoring	$	199, 410.00
	TOTAL	$	1,038,477.00

3. Pre-judgment interest

The Court adopts the government's analysis of pre-judgment interest for all assets stolen or embezzled by Defendant other than the Terayon stock. Because the agreed date of loss for all assets other than the Terayon stock is the date the assets were taken by Defendant, and because there is no legal or equitable reason why pre-judgment interest should not accrue at the rate in effect on that date until the agreed termination date of July 30, 2002, pre-judgment interests with respect to those assets should be calculated accordingly.[1] As to the Terayon stock, because the Court in effect has concluded that the loss occurred *after* the Terayon shares were taken by Defendant, i.e., that it occurred on the date Cisco lost the opportunity to sell the shares, it follows that the accrual date for

[1] Even accepting Defendant's argument that pre-judgment interest may accrue only on cash or its equivalent, the record reflects that each of the assets in question here had an ascertainable cash value as of the date of loss.

pre-judgment interest should be later as well. Applying equitable principles, since the variables used to determine the loss were not fixed until March 6, 2001, the Court concludes that pre-judgment interest on the Terayon stock should accrue from that date until July 30, 2002, at the rate in effect on March 6, 2001. Counsel for the government is requested to make the requisite calculations as to all pre-judgment interest and set forth such calculations in the formal order.

DATED: 6-2-03

/s/ Jeremy Fogel
JEREMY FOGEL
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ROBERT GORDON, Defendant.	No. CR 01-20077 JF **FINAL ORDER OF RESTITUTION** (Filed Jun 06, 2003)

Based upon the Application of the United States for a Final Order of Restitution, the Court's Memorandum of Intended Disposition of Submitted Issues Re: Restitution ("Intended Disposition Memorandum"), the Preliminary Order of Restitution and Forfeiture filed on April 4, 2003, the Final Order of Forfeiture filed on May 30, 2003, as well as the live testimony, documentary evidence, and argument submitted by the parties in connection with the formal restitution hearing held on May 27, 2003, and for other good cause shown,

IT IS HEREBY ORDERED as follows:

1. The defendant, Robert Gordon, shall pay restitution to Cisco Systems, Inc., ("Cisco") pursuant to 18 U.S.C. § 3663, in the following amounts:

A. $12,593,902.23 for the loss to Cisco from the taking of 154,525 shares of Terayon stock;

B. $2,400,000 for funds fraudulently obtained by the defendant on May 4, 1999, from an IV Broadband Fund Distribution;

C. $1,417,495 for the loss to Cisco from the August 7, 1998, taking of 13,186 shares of Microsoft Corporation (which subsequently split two-for-one);

D. $1,632,624 for the loss to Cisco for the taking on September 28, 1999, of a certificate refund for shares of Predictive, Inc.;

E. $227,436.96 for the loss to Cisco for the taking of Cabletron stock on August 26, 1997;

F. $227,532.40 for the loss to Cisco for the taking of shares of Internet Security Systems stock (ISSX) on various dates in 1999 (this amount reflects credit to the defendant for the value of ISSX shares the defendant returned to Cisco);

G. $2,806,503 for the loss to Cisco for the taking of an IVP Fund distribution on July 19, 2000;

H. $273,764.77, for the loss to Cisco resulting from the difference in the value of 2,839 shares of Broadcom stock taken by the defendant on November 20, 2000, and the value of the stock when the defendant surrendered the Broadcom certificate to the government July 5, 2001;

I. $2,354,558.16 from the sale of W-J Communications shares obtained fraudulently on August 23, 2000;

J. Certificate number 256 for 408,422 shares of Convergent Networks, Inc., in the name of Provident Corp.;

K. Certificate number 257 for 982,756 shares of Convergent Networks, Inc. in the name of Coastdock Co.;

L. Certificate number LU 10698 for 2839 shares of Broadcom in the name of Cisco Systems;

M. Prejudgment interest due to Cisco, calculated in accordance with this Court's May 30, 2003 Intended Disposition Memorandum and in the manner set forth in the Declaration of Siu Chiang attached as Exhibit A to the Application of the United States for a Final Order of Restitution, in the total amount of $2,424,913.32;

N. Investigative costs reimbursable to Cisco in the total amount of $1,038,477.00, pursuant to 18 U.S.C. § 3663A(b)(4) and paragraph 13 of the Plea Agreement; and

O. Pursuant to paragraph 14.b of the Plea Agreement, defendant shall be credited for $5,000,000 previously paid as restitution to Cisco as a result of defendant's April 2001 wire transfer to Spanlink.

2. The defendant shall pay restitution to the United States in the amount of $343,173.40, pursuant to 18 U.S.C. § 3663(a)(3) and paragraph 16.e of the Plea Agreement.

3. Pursuant to paragraph 22 of the Plea Agreement, paragraphs 3, 4, and 5.D. of the Preliminary Order of Restitution and Forfeiture, and paragraph 2 of the Final Order of Forfeiture, the Clerk of Court for the Northern District of California is hereby directed to pay the following amounts from the $5,000,000 cash funds held by the Clerk of Court as bond in this matter:

A. $3,814,346.47 shall be paid to Cisco as restitution pursuant to paragraph 1 of this Order, payment to be made as directed in paragraph 4 of this Order;

B. $343,173.40 shall be paid to the United States Treasury as restitution pursuant to paragraph 2 of this Order. The Clerk shall transfer this sum from the Clerk's bond account to its restitution funds account; and

C. $842,479.60 shall be paid to the "United States Marshal" as a criminal forfeiture pursuant to paragraph 2 of the Final Order of Forfeiture.

4. All amounts directed to be paid to "Cisco" pursuant to this Order shall be paid as follows: "Cisco Systems, Inc.," c/o Vern Granneman, Esq., Pillsbury Winthrop LLP, 2550 Hanover Street, Palo Alto, California 94305-1115.

IT IS SO ORDERED.

DATED 6-6-03

/s/ Jeremy Fogel
JEREMY FOGEL
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT S. GORDON, Defendant-Appellant.	No. 03-10322 D.C. No. CR-01-20077 JF ORDER (Filed Mar 02, 2005)

Before: FERNANDEZ, PAEZ, and CLIFTON, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Paez and Clifton have voted to deny the petition for rehearing en banc; and Judge Fernandez so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc, filed February 3, 2005, are DENIED.

18 USCS § 3663A (2002)

§ 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant –

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense –

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to –

(i) the greater of –

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim –

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense –

(A) that is –

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; or

(iii) an offense described in section 1365 (relating to tampering with consumer products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that –

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

No. 04-1632

In the Supreme Court of the United States

ROBERT S. GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether prejudgment interest may be awarded as part of a restitution order under the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A.

2. Whether, under the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A, the district court abused its discretion in establishing the date of loss for embezzled stocks by reference to the date when the victim would have sold the stocks but for the defendant's fraud.

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In the Supreme Court of the United States

No. 04-1632

ROBERT S. GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 393 F.3d 1044. The memorandum opinion (Pet. App. 35-39) and restitution order (Pet. App. 40-43) of the district court are unreported.

JURISDICTION

The court of appeals entered its judgment on December 30, 2004. A petition for rehearing was denied on March 2, 2005 (Pet. App. 44). The petition for a writ of certiorari was filed on May 31, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a guilty plea in the United States District Court for the Northern District of California, petitioner was convicted of two counts of wire fraud, in violation of 18 U.S.C. 1343, and one count of insider trading, in violation of 15 U.S.C. 78j(b). He was sentenced to 66 months of imprisonment and was ordered to pay $27,397,206.84 in restitution to the victim of his crimes. Pursuant to his plea agreement, petitioner waived his right to appeal, but he nevertheless appealed the restitution order. The court of appeals affirmed that order in part and reversed and remanded in part.

1. The Mandatory Victims Restitution Act of 1996 (Restitution Act), Pub. L. No. 104-132, Title II, 110 Stat. 1227, made victim restitution a mandatory component of the sentence for many federal crimes and provided for enhanced post-conviction enforcement of such orders by the federal government. 18 U.S.C. 3663A; 18 U.S.C. 3664 (2000 & Supp. II 2002). The Restitution Act directs that "the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." 18 U.S.C. 3664(f)(1)(A). With respect to property, loss is determined as "the greater of * * * the value of the property on the date of the * * * loss * * * or * * * the value of the property on the date of sentencing." 18 U.S.C. 3663A(b)(1)(B)(i). Losses may include "lost income" and "expenses incurred during participation in the investigation or prosecution of the offense." 18 U.S.C. 3663A(b)(4). Disputes respecting restitution are resolved by the district court by a preponderance of the

evidence, with the government bearing the burden of proving the loss. 18 U.S.C. 3664(e).

2. From September 1995 to April 2001, petitioner was employed by Cisco Systems. From late 1997 until April 2001, petitioner obtained stock certificates from companies in which Cisco had acquired an interest and, instead of depositing those certificates with Cisco's treasury department, petitioner transferred them to his personal brokerage accounts. Petitioner then sold the embezzled securities and used the money to make stock trades using information gained from his insider position with Cisco. Pet. App. 3-4. In addition, petitioner instigated a $15 million loan by Cisco to Spanlink, a start-up company to which petitioner, posing as a venture capitalist, previously had loaned $5 million of embezzled funds from Cisco. Petitioner had received 50,000 shares of Spanlink preferred stock as security for that $5 million loan. After Spanlink received the $15 million loan from Cisco, petitioner redeemed his stock for $10 million, netting a $5 million profit. *Id.* at 4. In April 2001, Cisco discovered petitioner's embezzlement. Despite petitioner's deliberate effort to destroy computer records of his transactions, Cisco was able to identify five different embezzlements during petitioner's five years with the company, which together had cost Cisco more than $13 million in losses. *Id.* at 4-5.

3. Petitioner pleaded guilty to two counts of wire fraud, in violation of 18 U.S.C. 1343, and one count of insider trading, in violation of 15 U.S.C. 78j(b). He also agreed to one count of criminal forfeiture, under 18 U.S.C. 982. Pet. App. 5. Under the plea agreement, petitioner agreed to forfeit the amounts alleged in the forfeiture count, and to pay restitution totaling $14,114,372.38 to Cisco and $343,173.40 to the govern-

ment. The government reserved the right in the plea agreement to argue for additional restitution for the value Cisco lost when it could not sell certain stocks, investigation costs, and prejudgment interest. *Ibid.* Petitioner also agreed to waive his right to appeal his "convictions, the judgment, and orders of the Court." *Ibid.*

The district court sentenced petitioner to 66 months of imprisonment and ordered petitioner to pay $27,397,206.84 in restitution under the Restitution Act. Pet. App. 5-6. That order included prejudgment interest. *Id.* at 6.

The restitution amount also reflected a disputed date-of-loss calculation for stocks embezzled by petitioner that otherwise would have been sold by Cisco. Pet. App. 6. As part of his scheme, petitioner embezzled 154,525 shares of stock held by Cisco in Terayon, another technology company, sold them, and deposited the proceeds into a personal account. *Id.* at 9. Between July 21, 1999, and March 6, 2001, Cisco had sold all of the Terayon shares over which it still had control. During that time period, the price of Terayon stock fluctuated from $46 per share in 1999, to a high of $285.26 per share in 2000, to $5.47 per share in March 2001, the date Cisco liquidated the last of the shares it held. The district court found that the "date of loss" for purposes of valuing the Terayon shares embezzled by petitioner was the date on which it could reasonably be inferred that Cisco would have sold the shares if petitioner had not embezzled them. *Id.* at 10. The court assumed that the embezzled shares would have been sold gradually during the period in which Cisco sold all the other shares and thus used the average daily closing price during that period as an approximation of Cisco's loss. Applying

that measure, the court found that the value of the embezzled Terayon shares was $12,593,902.23. *Ibid.*

4. a. The court of appeals affirmed the restitution order in relevant part, and reversed and remanded in part. Pet. App. 1-34. The court first held that, notwithstanding petitioner's waiver of his right to appeal, he retained the right to appeal the contested restitution amounts. *Id.* at 6-7.

The court rejected petitioner's argument that the district court had incorrectly found the date of loss for the Terayon shares. The court of appeals reasoned that the "district court reasonably construed the loss to Cisco concerning the Terayon stock to be its inability to liquidate the stock between July 21, 1999, and March 6, 2001, and therefore the 'date of the loss' to be each possible date within that particular period." Pet. App. 14. The court explained that, because Cisco lacked knowledge of petitioner's activities, it was unable to liquidate the embezzled Terayon shares throughout this period and it thus was appropriate for petitioner to bear the risk associated with the fluctuations in Terayon's share value. *Id.* at 14-15. In the court's view, the district court "sensibly concluded" that "limiting the restitution amount to the value of the shares on the date Gordon secretly stole them would underestimate Cisco's loss." *Id.* at 15. The court thus concluded that, while the district court was not required to calculate the date of loss in that manner, "the district court did not abuse its discretion in doing so." *Id.* at 16.

The court of appeals also rejected petitioner's challenge to the award of prejudgment interest on the dollar value of the stocks that would have been sold. Pet. App. 22-25. Following the decisions of numerous other courts, the court of appeals concluded that the Restitu-

tion Act "authorizes restitution for a victim's *actual* losses" and that "[f]oregone interest is one aspect of the victim's actual loss." *Id.* at 23 (quoting *United States* v. *Smith*, 944 F.2d 618, 626 (9th Cir. 1991), cert. denied, 503 U.S. 951 (1992)).

b. Judge Fernandez dissented in relevant part. Pet. App. 27-34. He would have valued the stolen shares on the date of embezzlement, rather than the date of financial loss, and would not have awarded prejudgment interest on the stock value. *Id.* at 28-29, 31-32.

ARGUMENT

1. Petitioner contends (Pet. 12-19) that the court of appeals erred in permitting the district court to include prejudgment interest in the calculation of loss for the stock Cisco would have sold had it not been embezzled by petitioner. That claim does not warrant this Court's review.

Contrary to petitioner's argument (Pet. 16-18), there is no conflict in the circuits. Quite the contrary, the courts of appeals (including many cited by petitioner, Pet. 16) have consistently upheld the award of prejudgment interest for losses associated with income-producing assets, under both the Restitution Act and its immediate predecessor, the Victim and Witness Protection Act of 1982, 18 U.S.C. 3663. See, *e.g.*, *United States* v. *Morgan*, 376 F.3d 1002, 1014 (9th Cir. 2004) (restitution

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With respect to embezzled stock that likely would not have been sold by Cisco, however, the court of appeals overturned the award of prejudgment interest. Pet. App. 25-26. The court reasoned that, "[b]ecause it is too speculative to conclude that Cisco would have liquidated these securities and placed the cash proceeds in an interest bearing account or used them for some other productive purpose, prejudgment interest on these securities cannot constitute an 'actual loss' to the victim." *Id.* at 26.

includes prejudgment interest, contractual interest, and finance charges); *United States* v. *Shepard*, 269 F.3d 884, 886 (7th Cir. 2001) (prejudgment interest award upheld "to make up for the loss of the funds' capacity to grow"); *Government of the Virgin Islands* v. *Davis*, 43 F.3d 41, 47 (3d Cir. 1994), cert. denied, 515 U.S. 1123 (1995); *United States* v. *Hoyle*, 33 F.3d 415, 420 (4th Cir. 1994), cert. denied, 513 U.S. 1133 (1995); *United States* v. *Patty*, 992 F.2d 1045, 1050 (10th Cir. 1993) (prejudgment interest is "especially" appropriate when "the victim is a financial institution"); *United States* v. *Rochester*, 898 F.2d 971, 983 (5th Cir. 1990).

Petitioner's reliance (Pet. 16) on *United States* v. *Rico Industries, Inc.*, 854 F.2d 710 (5th Cir. 1988), cert. denied, 489 U.S. 1078 (1989), and *United States* v. *Sleight*, 808 F.2d 1012 (3d Cir. 1987), is misplaced. The restitution orders in both of those cases were imposed under the Probation Act, 18 U.S.C. 3651 (1982) (repealed by Sentencing Reform Act of 1984, Pub. L. No. 98-473, Title II, ch. II, § 212(a)(1) and (2), 98 Stat. 1987). See *Rico*, 854 F.2d at 714; *Sleight*, 808 F.2d at 1020. *Rico* and *Sleight* denied prejudgment interest under the Probation Act by applying the rule that "[c]riminal penalties do not bear interest." *Rico*, 854 F.2d at 714; see *Sleight*, 808 F.2d at 1020; see also *Rodgers* v. *United States*, 332 U.S. 371, 374-375 (1947). In later decisions, however, the Third and Fifth Circuits have concluded that restitution under the Victim and Witness Protection Act of 1982, 18 U.S.C. 3663 "is compensatory rather than punitive," and thus that prejudgment interest is available. See *Davis*, 43 F.3d at 47; *Rochester*, 898 F.2d at 983; accord *Patty*, 992 F.2d at 1050. Neither the Third nor the Fifth Circuits has applied their Probation Act precedents to the Restitution Act. There is, therefore, no con-

flict on the availability of prejudgment interest under the latter statute.

Petitioner argues (Pet. 16-17) that the stocks he embezzled were not sufficiently analogous to the other income-producing assets for which courts have routinely permitted prejudgment interest. In his view, the instruments in those cases were interest-bearing, unlike the embezzled stocks here. Petitioner, however, cites no court of appeals (or even a district court) decision that has drawn that distinction or has denied prejudgment interest under the circumstances presented here. Nor does he explain why this particular form of lost income does not warrant an award of prejudgment interest under the terms of the statute. The Restitution Act specifically commands courts to order restitution in the "full amount of each victim's losses," 18 U.S.C. 3664(f)(1)(A), and that loss includes "lost income," 18 U.S.C. 3663A(b)(4). Awarding prejudgment interest on income lost because of the theft of valuable assets, like the stocks embezzled here, ensures that the restitution award reflects the "full amount" of the victim's loss of income-generating assets and the "lost income" caused by the crime.

2. Petitioner also seeks (Pet. 21-29) this Court's review of the district court's calculation of the date of loss for the Terayon stocks. The record-bound determination of when Cisco's "loss" of the value of its embezzled stocks occurred does not warrant this Court's review. Petitioner cites no contrary authority interpreting the Restitution Act's "date of the loss" provision with respect to embezzled securities.

Petitioner's contention (Pet. 22-25) that the court could consider only the market value of the shares on the date of embezzlement overlooks that Congress

amended the Victim and Witness Protection Act in 1994 to make clear that restitution awards "in any case" may include an award to "reimburse the victim for lost income," 18 U.S.C. 3663(b)(4). See Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40504, 108 Stat. 1947. That same provision was carried forward in the Restitution Act. 18 U.S.C. 3663A(b)(4). Almost all of the cases upon which petitioner relies (Pet. 25-26) predate that significant statutory enhancement in the courts' authority to compensate a victim for lost income.

United States v. *Simmonds*, 235 F.3d 826 (3d Cir. 2000) (cited at Pet. 25), is of no help to petitioner. That case, in fact, rejected an exclusive focus on the market value of an asset at the time of the crime. The court held that the restitution order reasonably reflected the later replacement value, rather than market value at the time of the crime, of furniture destroyed in an arson. *Simmonds*, 235 F.3d at 832; see also *United States* v. *Shugart*, 176 F.3d 1373, 1375 (11th Cir. 1999) (cited at Pet. 26) (upholding award of replacement value for burned church building).

The court of appeals in *Simmonds* also held that the district court erred in ordering restitution for the loss of discounted insurance policy premiums (*i.e.*, lower premiums) occasioned by the victim's filing of an insurance claim. But that was because the court held that those lost discounts were not "property" that was "damaged[,] lost or destroyed" by the defendants' criminal acts. 235 F.3d at 833. Rather, they reflected indirect, consequential damages, which the Restitution Act does not permit. *Ibid.* Here, by contrast, the district court did not abuse its discretion in concluding that the income lost by Cisco due to petitioner's embezzlement of income-generating stocks both was property and was properly compensable

"lost income" directly caused by petitioner's crimes. In any event, the district court's case-specific calculation of the date of loss for the Terayon stocks in this case—a finding that was sustained by the court of appeals only on the ground that it did not amount to an abuse of discretion, rather than as a rule of law that would control future restitution awards in that circuit, Pet. App. 16—does not present the type of broadly recurring legal question that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
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ALICE S. FISHER
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RICHARD A. FRIEDMAN
Attorney

SEPTEMBER 2005

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QUESTIONS PRESENTED

1. Whether prejudgment interest may be awarded as part of a restitution order under the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A.

2. Whether, under the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A, the district court abused its discretion in establishing the date of loss for embezzled stocks by reference to the date when the victim would have sold the stocks but for the defendant's fraud.

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2. From September 1995 to April 2001, petitioner was employed by Cisco Systems. From late 1997 until April 2001, petitioner obtained stock certificates from companies in which Cisco had acquired an interest and, instead of depositing those certificates with Cisco's treasury department, petitioner transferred them to his personal brokerage accounts. Petitioner then sold the embezzled securities and used the money to make stock trades using information gained from his insider position with Cisco. Pet. App. 3-4. In addition, petitioner instigated a $15 million loan by Cisco to Spanlink, a start-up company to which petitioner, posing as a venture capitalist, previously had loaned $5 million of embezzled funds from Cisco. Petitioner had received 50,000 shares of Spanlink preferred stock as security for that $5 million loan. After Spanlink received the $15 million loan from Cisco, petitioner redeemed his stock for $10 million, netting a $5 million profit. *Id.* at 4. In April 2001, Cisco discovered petitioner's embezzlement. Despite petitioner's deliberate effort to destroy computer records of his transactions, Cisco was able to identify five different embezzlements during petitioner's five years with the company, which together had cost Cisco more than $13 million in losses. *Id.* at 4-5.

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ARGUMENT

1. Petitioner contends (Pet. 12-19) that the court of appeals erred in permitting the district court to include prejudgment interest in the calculation of loss for the stock Cisco would have sold had it not been embezzled by petitioner. That claim does not warrant this Court's review.

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Petitioner's reliance (Pet. 16) on *United States* v. *Rico Industries, Inc.*, 854 F.2d 710 (5th Cir. 1988), cert. denied, 489 U.S. 1078 (1989), and *United States* v. *Sleight*, 808 F.2d 1012 (3d Cir. 1987), is misplaced. The restitution orders in both of those cases were imposed under the Probation Act, 18 U.S.C. 3651 (1982) (repealed by Sentencing Reform Act of 1984, Pub. L. No. 98-473, Title II, ch. II, § 212(a)(1) and (2), 98 Stat. 1987). See *Rico*, 854 F.2d at 714; *Sleight*, 808 F.2d at 1020. *Rico* and *Sleight* denied prejudgment interest under the Probation Act by applying the rule that "[c]riminal penalties do not bear interest." *Rico*, 854 F.2d at 714; see *Sleight*, 808 F.2d at 1020; see also *Rodgers* v. *United States*, 332 U.S. 371, 374-375 (1947). In later decisions, however, the Third and Fifth Circuits have concluded that restitution under the Victim and Witness Protection Act of 1982, 18 U.S.C. 3663 "is compensatory rather than punitive," and thus that prejudgment interest is available. See *Davis*, 43 F.3d at 47; *Rochester*, 898 F.2d at 983; accord *Patty*, 992 F.2d at 1050. Neither the Third nor the Fifth Circuits has applied their Probation Act precedents to the Restitution Act. There is, therefore, no con-

flict on the availability of prejudgment interest under the latter statute.

Petitioner argues (Pet. 16-17) that the stocks he embezzled were not sufficiently analogous to the other income-producing assets for which courts have routinely permitted prejudgment interest. In his view, the instruments in those cases were interest-bearing, unlike the embezzled stocks here. Petitioner, however, cites no court of appeals (or even a district court) decision that has drawn that distinction or has denied prejudgment interest under the circumstances presented here. Nor does he explain why this particular form of lost income does not warrant an award of prejudgment interest under the terms of the statute. The Restitution Act specifically commands courts to order restitution in the "full amount of each victim's losses," 18 U.S.C. 3664(f)(1)(A), and that loss includes "lost income," 18 U.S.C. 3663A(b)(4). Awarding prejudgment interest on income lost because of the theft of valuable assets, like the stocks embezzled here, ensures that the restitution award reflects the "full amount" of the victim's loss of income-generating assets and the "lost income" caused by the crime.

2. Petitioner also seeks (Pet. 21-29) this Court's review of the district court's calculation of the date of loss for the Terayon stocks. The record-bound determination of when Cisco's "loss" of the value of its embezzled stocks occurred does not warrant this Court's review. Petitioner cites no contrary authority interpreting the Restitution Act's "date of the loss" provision with respect to embezzled securities.

Petitioner's contention (Pet. 22-25) that the court could consider only the market value of the shares on the date of embezzlement overlooks that Congress

amended the Victim and Witness Protection Act in 1994 to make clear that restitution awards "in any case" may include an award to "reimburse the victim for lost income," 18 U.S.C. 3663(b)(4). See Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40504, 108 Stat. 1947. That same provision was carried forward in the Restitution Act. 18 U.S.C. 3663A(b)(4). Almost all of the cases upon which petitioner relies (Pet. 25-26) predate that significant statutory enhancement in the courts' authority to compensate a victim for lost income.

United States v. *Simmonds*, 235 F.3d 826 (3d Cir. 2000) (cited at Pet. 25), is of no help to petitioner. That case, in fact, rejected an exclusive focus on the market value of an asset at the time of the crime. The court held that the restitution order reasonably reflected the later replacement value, rather than market value at the time of the crime, of furniture destroyed in an arson. *Simmonds*, 235 F.3d at 832; see also *United States* v. *Shugart*, 176 F.3d 1373, 1375 (11th Cir. 1999) (cited at Pet. 26) (upholding award of replacement value for burned church building).

The court of appeals in *Simmonds* also held that the district court erred in ordering restitution for the loss of discounted insurance policy premiums (*i.e.*, lower premiums) occasioned by the victim's filing of an insurance claim. But that was because the court held that those lost discounts were not "property" that was "damaged[,] lost or destroyed" by the defendants' criminal acts. 235 F.3d at 833. Rather, they reflected indirect, consequential damages, which the Restitution Act does not permit. *Ibid.* Here, by contrast, the district court did not abuse its discretion in concluding that the income lost by Cisco due to petitioner's embezzlement of income-generating stocks both was property and was properly compensable

"lost income" directly caused by petitioner's crimes. In any event, the district court's case-specific calculation of the date of loss for the Terayon stocks in this case—a finding that was sustained by the court of appeals only on the ground that it did not amount to an abuse of discretion, rather than as a rule of law that would control future restitution awards in that circuit, Pet. App. 16—does not present the type of broadly recurring legal question that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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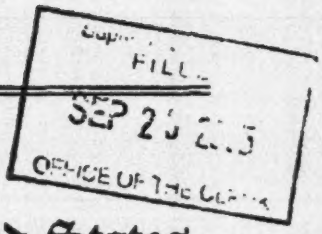

In The

Supreme Court of the United States

ROBERT S. GORDON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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I.

The Ninth Circuit's Decision Ordering Petitioner to Pay "Prejudgment Interest" as Criminal Restitution Conflicts with Decisions of the Third, Fourth, Fifth, Seventh and Tenth Circuits

A. The Ninth Circuit's Decision Conflicts with the Decisions of Other Circuits Because it Orders Pre-Judgment Interest on a Non-Interest Bearing Asset

The criminal restitution order in this case, as modified and affirmed by the Ninth Circuit, directs Petitioner Robert S. Gordon to pay Cisco Systems, Inc. more than $2,000,000 as "prejudgment interest," *in addition to* the amount he is required to pay for the "value of the property" (*i.e.*, stock and cash) he embezzled.[1] Pet. App. 22, 25-26.

The Government asserts "there is no conflict in the circuits" because decisions of other circuits have upheld restitution orders that included an amount for interest. Opposition Brief 6 (citations omitted). The Government itself acknowledges that assertion is overstated, when it later states "[t]here is . . . no conflict on the *availability* of prejudgment interest . . . " under the MVRA.[2] Opposition

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[1] The Government's Brief reflects its mistaken understanding that Petitioner was ordered to pay prejudgment interest only as to the securities he embezzled which Cisco had liquidated. Brief for the United States In Opposition ("Opposition Brief") 6, n.* Petitioner was also ordered to pay "prejudgment interest" as to the cash distributions he misappropriated. Pet. App. 25 (prejudgment interest appropriately awarded "for the embezzled cash . . . ").

[2] Referring to the Mandatory Victims Restitution Act of 1996 ("MVRA"). Title II of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

Brief ("Opposition Brief") 7-8 (emphasis added). Even that more limited assertion is in error, however, as decisions of the Fifth and Third Circuits hold interest may not be ordered as criminal restitution because "[c]riminal penalties do not bear interest." *United States v. Rico Indus., Inc.*, 854 F.2d 710, 714 (5th Cir. 1988) *and United States v. Sleight*, 808 F.2d 1012, 1020 (3d Cir. 1987). The Government's contention that those cases are inapplicable to the MVRA because subsequent decisions of the Third and Fifth Circuits said that restitution under the Victim Witness and Protection Act of 1992, 18 U.S.C. 3663 "is compensatory rather than punitive" (Opposition Brief 7 (citations omitted)) is without merit because "restitution under the MVRA is a form of criminal penalty rather than civil redress." *United States v. Edwards*, 162 F.3d 87, 91 (3rd Cir. 1998) *citing and quoting*, S.Rep. No. 104-179, 1996 U.S.C.A.N. 924, 925-926, 930-931.

The Third and Fifth Circuit decisions would not prohibit interest being included in the restitution ordered to be paid for the "value of the property." 18 U.S.C. § 3663A(b)(1)(B); *see* Pet. App. 33 (Fernandez, J., dissenting). They do, however, prohibit "prejudgment interest" being added to a restitution order as a separate item as was done here.

The Government's assertion that courts have "consistently upheld the award of prejudgment interest for losses associated with income-producing assets" is an overgeneralized description of the case law that masks the conflict between the Ninth Circuit and the Fourth, Seventh and Tenth Circuits. *See* Pet. 16 (citing cases). Opposition Brief 6. Judge Fernandez's dissent more narrowly and more accurately summarized prior cases as granting interest only "where the property taken was 'money,' and

that money was being loaned at a given interest rate or was contained in an interest bearing account or instrument." Pet. App. 32 (Fernandez, J., dissenting) (citations omitted).

The Government's assertion that no court has drawn the distinction as to an asset being interest-bearing in ordering interest to be paid as restitution is simply wrong. Opposition Brief 8, *see, e.g., United States v. Shepard*, 269 F.3d 884, 886 (7th Cir. 2001) (money stolen from interest bearing account); *Govt. of Virgin Islands v. Davis*, 43 F.3d 41, 46-47 (3d Cir. 1994) (loss of interest on stolen certificates of deposit). Nor does the absence of a published decision denying "prejudgment interest under the circumstances presented here" (Opposition Brief 8) mean there is not a conflict in the circuits. The conflict here is not between a decision in one circuit that denies interest on the same facts on which another circuit grants interest; rather, the Ninth Circuit's decision conflicts with the decisions of the Third, Fourth, Fifth, Seventh and Tenth Circuits in that (1) it grants interest in the absence of an interest-bearing asset, whereas the other circuits grant interest only where there is an interest-bearing asset, and (2) it relies on the corporate character of the victim as the basis for ordering interest, whereas the decisions of the other circuits rely on the nature of the asset. Pet. App. 25 ("As a corporation," Cisco is "eligible for prejudgment interest restitution . . . ,").

B. The "Lost Income" Provision of Section 3663A(b)(4) Does Not Provide an Alternative Basis for Upholding the Award of Prejudgment Interest

The Government suggests review is not warranted because the prejudgment interest could have been ordered to be paid as "lost income" under section 3663A(b)(4).[3] Opposition Brief 8. The Government cites no decision in which prejudgment interest has been ordered as "lost income," and neither Cisco, nor the Government on behalf of Cisco, ever attempted to argue or establish it was entitled to "lost income" restitution. The award for prejudgment interest could not have been based on the "lost income" provision in any event, because the restitution to be ordered for loss of property is specified by section 3663A(b)(1). The lost income provision of section 3663A(b)(4) does not replace, supercede or negate the restitution that section 3663A(b)(1) specifies is to be ordered for the loss of property, but rather makes restitution available for another type of loss.

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[3] Section 3663A(b)(4) provides that the order of restitution shall require the defendant "(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense."

II.

The Ninth Circuit's Decision Ordering Restitution for "Lost Opportunity" Profits Conflicts with Decisions of the Third, Fourth and Fifth Circuits

The restitution Petitioner should have been ordered to pay for the embezzled Terayon shares was the value of the shares on the date they were embezzled, $6,523,250. Excerpts of Record 53, 18 U.S.C. § 3663A(b)(1)(B)(i)(I). Instead, the district court ordered restitution of $12,593,902.23, because it awarded restitution to Cisco for its lost opportunity to make additional profit by selling the shares at a higher price. Pet. App. 36.

The Government opposes review by asserting the district court's "record-bound determination of when Cisco's 'loss' of the value of its embezzled shares occurred does not warrant this Court's review." Opposition Brief 8. The district court did not determine when "Cisco's 'loss' of the value of its embezzled shares occurred"; rather, it sought to determine when Cisco would have sold the shares had they not been embezzled, in order to calculate Cisco's "lost opportunity" to make additional profit. Pet. App. 36. Moreover, the issue as to which Petitioner seeks review is not whether the district court's "record-bound determination" as to when Cisco would have sold the shares had they not been embezzled is correct, but the legal question of whether "lost opportunity" is a permissible measure of restitution for an offense involving the loss of property. Pet. 21-25.

The Government opposes Petitioner's claim that review is warranted as to the Ninth Circuit's interpretation of "the date of the . . . loss" provision on the ground that Petitioner "cites no contrary authority interpreting

the Restitution Act's 'date of loss' provision with respect to embezzled securities." Opposition Brief 8. The statute treats all property uniformly (and with good reason, as it advances the goal of streamlining criminal restitution) and thus the contrary decisions cited by Petitioner, while not involving securities, are of the same significance. Pet. 26, *citing*, *United States v. Shugart*, 176 F.3d 1373, 1375 (11th Cir. 1999) and *United States v. Mullins*, 971 F.2d 1138, 1147 (4th Cir. 1992). The Government's failure to cite any decision that orders restitution based on the value of the property on a date other than its loss or on the date of sentencing provides further confirmation that the Ninth Circuit's ruling in this case that "the date of the . . . loss" is a flexible concept to be interpreted on a case-by-case basis conflicts with existing precedent.

The Government also seeks to avoid review on this issue by relying on the same "lost income" provision that it offered as an alternative basis for ordering prejudgment interest. Opposition Brief 8-9. The Government relies on this same provision in an attempt to discredit the cases relied on by Petitioner by noting that Congressional authorization for restitution for "lost income" "in any case" first became available in 1994, and "[a]lmost all of the cases upon which Petitioner relies predate that significant statutory enhancement in the courts' authority to compensate a victim for lost income." Opposition Brief 9. The lost income provision has no bearing on this case or Petitioner's reliance on the pre-1994 cases he cited for the same reasons explained above. *See*, p. 4, *supra*.

The Government's assertion that *United States v. Simmonds*, 235 F.3d 826 (3rd Cir. 2000) "is of no help to petitioner" refers not to the ruling in *Simmonds* that Petitioner cited as support, but the court's ruling upholding the district court's order of restitution for furniture

destroyed in a fire in an amount equal to its "replacement value," rather than its "market value." 235 F.3d at 832. The Government is correct that the court "rejected an exclusive focus on the market value of an asset at the time of the crime," but that aspect of *Simmonds* has no relevance here because the parties agreed market value was appropriate. The ruling has relevance here only in that the Third Circuit never questioned that the replacement "value of the property" was to be determined as of "the date of the damage, loss or destruction." Sec. 3663A(b)(1)(B); *Simmonds*, 235 F.3d at 831-33.

The Government seeks to discredit Petitioner's reliance on *Simmonds'* ruling denying restitution for the victims' lost insurance premium discounts as support for his position that "lost opportunity" restitution is improper by asserting the court in *Simmonds* denied restitution because it held the "lost discounts" "were not 'property' that was 'damaged[,] lost or destroyed' by the defendants' criminal acts," and instead "reflected indirect, consequential damages, which the Restitution Act does not permit." Opposition Brief 9. The court in *Simmonds* did not, as the Government suggests, rest its ruling on the absence of a causal connection between Simmonds' crime and the victims' lost insurance premium discounts. The court itself stated that "[t]he victims' lost insurance premium discounts are unquestionably a result of the defendant's criminal conduct." *Simmonds*, 235 F.3d at 834. Moreover, the court expressly stated that it was denying restitution for the lost insurance premium discounts because they "*do not in any way constitute or represent* 'the value of the property' lost, damaged or destroyed as a result of Simmonds's crimes." 235 F.3d at 834 (emphasis added).

The *Simmonds* court did say that "under § 3663A . . . the victims lost insurance premium discounts are consequential damages," but that is because the Third Circuit had previously interpreted the term "'property' in § 3663A(b)(1), as not including consequential damages." *Simmonds*, 235 F.3d at 834, *citing Govt. of Virgin Islands v. Davis*, 43 F.3d 41 (3d Cir.1994). Under Third Circuit precedent, Cisco's lost opportunity profits would be deemed to "not in any way constitute or represent 'the value of the property' lost, damaged or destroyed as a result of [Petitioner's] crimes," and would also be deemed to be "consequential damages." *Simmonds*, 235 F.3d at 834. The Government's assertion that the contrary ruling in this case was proper on the ground that "the district court did not abuse its discretion in concluding that the income lost by Cisco due to petitioner's embezzlement of income-generating stocks both was property and was properly compensable 'lost income' directly caused by petitioner's crimes," (Opposition Brief 9-10), merely confirms the existence of the conflict in the circuits and the need for review.

CONCLUSION

The petition for certiorari should be granted, and the order for prejudgment interest restitution should be ordered vacated and the lost opportunity restitution for the Terayon shares should be ordered vacated and

restitution ordered in an amount equal to the value of the property on the date of its loss.

Respectfully submitted,

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